84-1148

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

RUSSELL HOBSON III,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. May the government use marihuana offenses as predicate acts to establish violations of the federal racketeering statute (RICO)?

2. Where a defendant has committed only one act, may the government prove a pattern of racketeering activity, as required to convict a defendant of racketeering, by charging the single act in two separate counts and claiming that the single act is a pattern because it constitutes two offenses?

3. May a drug enforcement agent, who was given authorization by a district attorney to seek a wiretap order, decide on his own to seek amendments of the order, without authorization by the district attorney or any other person who is permitted under federal and state law to authorize applications for wiretap surveillance?

4. Did the Court of Appeals depart from the accepted and usual practice of certifying unsettled questions of state law to the state supreme court and thereby invade the province of state courts when it decided *sua sponte*—in the absence of any state authorities, and without the government even arguing the point—that state law, which governed the validity of a wiretap application, did not require a showing of probable cause for an amendment of a wiretap order to authorize interception of changed telephone numbers?

5. Does the government have an obligation under the Due Process Clause of the Fifth Amendment and under the Federal Rules of Appellate Procedure to correct serious misrepresentations of fact that it makes to a court of appeals with respect to the contents of the record in a multi-defendant, complicated case, especially when the misrepresentations are called to its attention with specificity and the government has both the time and the opportunity to make a correction?

6. Has a defendant in a criminal case been denied his Sixth Amendment right to counsel when, on a pretrial

motion to disqualify defense counsel, the government misrepresents testimony it plans to adduce at trial and asserts this misrepresented testimony as the basis for disqualification?

PARTIES BELOW

In addition to the United States of America, the following persons were parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit, the court whose judgment is sought to be reviewed:

Russell Hobson III
Antonio E. Bascaro
Patrick M. Waldrop
Manuel Eric Villanueva
Gustavo J. Fernandez
Manuel W. James

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OPINION BELOW

The opinion of the Court of Appeals is reported at 742 F.2d 1335 (11th Cir. 1984). It is reproduced in the Appendix to this petition at App. 1-50.

JURISDICTION

The judgment sought to be reviewed was dated and entered October 1, 1984. Rehearing and rehearing en banc were denied by an order of the Eleventh Circuit issued and filed December 6, 1984. App. 51. The statutory provision which confers on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The following pertinent statutes are reproduced in the Appendix:

18 U.S.C. §§ 1961(A), (D); (4); (5) appear at App. 53;

18 U.S.C. §§ 1962(c), (d) appear at App. 53;

18 U.S.C. § 2516(1)(e) appears at App. 54;

21 U.S.C. § 841(b)(4) appears at App. 55;

21 U.S.C. § 841(b)(6) appears at App. 55.

STATEMENT OF THE CASE

Russell Hobson III was an alleged purchaser from an organization which imported and distributed marihuana from 1977 to 1981. He was indicted in 1981 for violations of 18 U.S.C. §§ 1961, 1962(d) (Count 1—RICO conspiracy); 18 U.S.C. §§ 1961, 1962(c) (Count 2—substantive RICO violation); 21 U.S.C. § 963 (Count 3—conspiracy to import marihuana); 21 U.S.C. § 952(a) (Count 4—importation of marihuana); 21 U.S.C. § 846 (Count 5—conspiracy to distribute marihuana); and 21 U.S.C. § 841(a) (Count 10—possession of marihuana with intent to distribute).

Prior to trial, a district court order disqualifying Hobson's trial counsel was appealed to the Eleventh Circuit where it was affirmed by a divided panel. *United States v. Hobson*, 672 F.2d 825 (11th Cir.), *cert. denied*, 459 U.S. 906 (1982).

The government's theory before the district court—whose jurisdiction rested upon 18 U.S.C. § 3231—was that an organization existed to import and distribute marihuana with three principal leaders, Villanueva, Acosta and Bascaro, who were referred to as the Cubans. Two of the government's key witnesses, William Cobb and Dan Abbey (brothers-in-law), supposedly were executives who sold the marihuana and distributed the proceeds. Petitioner was alleged to have been a purchaser of marihuana. This was his only involvement in or with the organization.

The government presented testimony—principally that of Cobb and Abbey—and offered wiretap evidence—principally of calls between petitioner and Cobb and Abbey—to support its charges. The evidence would have supported a charge that petitioner had purchased marihuana either on one or at most two occasions, and additionally that he attempted to purchase marihuana on another occasion. But the government chose not to charge petitioner with possession of marihuana based on the testimony concerning the purchase that he made, and the government chose not to charge him with attempting to purchase marihuana on the other occasion. Instead, the government sought to use the purchase as proof that petitioner conspired to import and conspired to distribute marihuana. And the government sought to use the single attempt to purchase marihuana not only to convict petitioner of importation and possession with intent to distribute, but also as the predicate acts by which it would prove its substantive RICO and conspiracy charges. Following his convictions on all counts, petitioner was sentenced to consecutive terms of imprisonment totalling 35 years and fined $110,000.

REASONS FOR GRANTING THE WRIT

The Court Of Appeals Has Decided Important Questions Of Federal Law Which Have Not Been But Should Be Settled By This Court; Has Rendered A Decision In Conflict With The Decision Of Another Federal Court Of Appeals On The Same Matter; And Has So Far Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Powers Of Supervision.

By this petition, Russell Hobson raises questions crucial to the administration of justice. His petition presents issues arising from RICO prosecutions, wiretap applications, and government misrepresentations both of the need for disqualification of counsel in the trial court and of the trial record in the Court of Appeals.

The Court of Appeals' holding that marihuana offenses may be predicate acts for purposes of the Racketeer Influenced and Corrupt Organizations (RICO) chapter of the Organized Crime Control Act of 1970, 18 U.S.C. §§ 1961-1968, is inconsistent with the legislative history of the RICO statute. It ignores this Court's opinions regarding the proper interpretation of federal statutes and disregards the careful approach Congress took in fashioning the definition of predicate offenses under RICO.

The Court's holding that a single act may constitute a pattern of racketeering is also inconsistent with the legislative history and totally ignores the Department of Justice's own guidelines with respect to RICO.

The Court's holding that a drug enforcement agent, who is not authorized to seek amendments of wiretap orders, may do so on his own is inconsistent with a decision of the United States Court of Appeals for the First Circuit and gives police officials discretionary authority that both federal and state law denies them.

The Court's determination that state law permits amendments to wiretap changed telephone numbers without any showing whatever that the new numbers are being used as the old numbers were used invades the province of state courts, since the Court arrived at such a determination *sua sponte* and without any state precedents to guide it. The government, which had the cooperation of state law enforcement officials in this case, never argued that state law operated in the manner the Court of Appeals said it did. Petitioner asked the Court of Appeals in his petition for rehearing to certify the important state law question to the Florida Supreme Court, the usual procedure for obtaining state guidance on critical questions of state law. But the Court declined to certify the issue, even though it had no state law supporting its decision, and several state appellate decisions cast doubt upon it.

These issues relate to construction of federal and state statutes by the Court of Appeals. All are important as the government relies increasingly on the use of RICO to prosecute drug and other offenses. In many of the RICO prosecutions, wiretap orders are sought. Thus, the combination of RICO and wiretap issues is especially important to federal law enforcement. Those issues, petitioner submits, need clarification.

The final issues relate to egregious government misconduct. In the trial court, the government misrepresented its need for testimony which, if adduced, would have required disqualification of petitioner's counsel. These misrepresentations were not corrected in its brief to the Court of Appeals on petitioner's pretrial appeal. Similarly, in its brief to the Court of Appeals, the government made serious misrepresentations of the trial record. Although petitioner sought to correct these mistakes in a reply brief, the government made no effort to inform the Court that it had, in fact, distorted the record. Perhaps because of the number of defendants and charges and the size of the record, the Court of Appeals relied on the government's false statements as to the record in affirming petitioner's convictions. In a petition for rehearing, petitioner again attempted to call the Court's and the government's attention to the misrepresentations that had found their way into a critical portion of the opinion affirming petitioner's convictions. And once again, the government made no effort to confess its mistakes to the Court. As a result, the Court of Appeals denied a rehearing. The issue that petitioner raises—an issue that he prays this Court will ask the Solicitor General to address—is whether the government has any obligation under the Due Process Clause of the Fifth Amendment and under the Federal Rules of Appellate Procedure to correct misrepresentations of a trial record when those misrepresentations have been specifically called to its attention and it has opportunity and time to make the corrections. Petitioner believes that if this Court asks the Solicitor General to address this issue, he will have no choice but to concede that the government did

misrepresent the record and that the Court of Appeals was misled on critical points. This issue goes to the heart of the judicial process: Is a criminal defendant in a multi-defendant, complex case entitled to fair treatment on appeal as well as at trial?

A. MARIHUANA OFFENSES ARE NOT RICO RACKETEERING ACTS.

Petitioner was convicted of two counts charging violations of the Racketeer Influenced and Corrupt Organizations (RICO) chapter of the Organized Crime Control Act of 1970, 18 U.S.C. §§ 1961-1968. These RICO charges were based solely on petitioner's attempted purchase of marihuana. RICO requires racketeering activity, 18 U.S.C. §§ 1962(c), (d), and racketeering activity is defined to include state and federal felonies involving "narcotic or other dangerous drugs." 18 U.S.C. § 1961(1)(A), (D). The question, then, is whether Congress intended to treat marihuana transactions as racketeering acts.[1]

1. The Congressional Treatment of Controlled Substances Prior to 1970

RICO was enacted in October of 1970, twelve days prior to the enactment of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 801-966 ("Controlled Substances Act"). Prior to 1970, the United States Code punished transactions involving three categories of drugs: narcotic drugs, marihuana and depressant or stimulant drugs. The term "depressant or stimulant drug" was defined to encompass dangerous drugs other than narcotics and marihuana, including lysergic acid diethylamide (LSD) and other drugs with hallucinogenic effects. 21 U.S.C. § 321(v)(3).[2] It is clear that neither narcotics nor marihuana

[1] This issue is currently before the Court on an application for a writ of certiorari in *Gustafson v. United States*, No. 84-482 (filed Sept. 26, 1984).

[2] This and three sections of Title 21 cited in this paragraph (§§ 174, 176(a), 331(q)(2)) are no longer in force, having been

(footnote continued on next page)

were included within this category.[3] Congress provided separate penalties for sales of narcotic drugs (21 U.S.C. § 174); sales of marihuana (21 U.S.C. § 176(a)); and sales of depressant or stimulant drugs (21 U.S.C. §§ 331(q)(2) and 333(a), (b)). Thus, marihuana was distinguished not only from narcotics but also from other dangerous drugs.

Consistent with this scheme, Congress maintained these legislative categories in 1968 when it enacted Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-2520. In listing the offenses for which wiretap authorization could be sought, Congress included "any offense involving ... the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States." 18 U.S.C. § 2516(1)(e).

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repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 84 Stat. 1236.

[3]The definition of "depressant or stimulant drug" set forth in the former 21 U.S.C. § 321(v)(3) expressly distinguished narcotic drugs and marihuana from the depressant or stimulant drugs: "... except that the Secretary shall not designate ... any substance that is now included, or is hereafter included, within the classifications stated in section 4731 [narcotic drugs], and marihuana as defined in section 4761 of Title 26."

2. The Controlled Substances Act

When it enacted the Controlled Substances Act, Congress maintained the three legislative categories. Narcotic drugs were defined in 21 U.S.C. § 802(16); marihuana was defined in 21 U.S.C. § 802(15); and depressant or stimulant substances were defined in 21 U.S.C. § 802(9).[4] All substances contained in the categories were distributed among the schedules established by the Act and were therefore "controlled substances," the term utilized to describe all drugs covered by the new Act. 21 U.S.C. § 802(6).

The delivery of all controlled substances was a felony—with one critical exception. In 21 U.S.C. § 841(b)(4), Congress established that a person who violated federal law "by distributing a small amount of marihuana for no remuneration" should be treated as a misdemeanant.[5]

Thus, in the 1970 Controlled Substances Act Congress continued to distinguish marihuana from narcotics and other dangerous drugs, a pattern that it had consistently followed.

3. The RICO Statutes

Professor G. Robert Blakey, the principal author of RICO, *United States v. Lee Stoller Enterprises, Inc.*, 652 F.2d 1313, 1319 n.10 (7th Cir.) (en banc), *cert. denied*, 454 U.S. 1082 (1981), was also the principal drafter of Title III, *United States v. Giordano*, 416 U.S. 505, 517-18 & n.7 (1974). When he drafted RICO, he sought the same inclusion of marihuana as he had accomplished in the wiretap statute.[6] In fact, the parallels

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[4] "Depressant or stimulant substance" was a more medically accurate replacement for "dangerous drug" and corresponded with the terminology employed in the Drug Abuse Control Amendments of 1965, Pub. L. No. 89-74, § 3(a), 79 Stat. 226, 227.

[5] The significance of the Congressional decision to treat the gratuitous delivery of marihuana as a misdemeanor will be treated in petitioner's discussion of RICO, *infra* pp. 10-11.

[6] He was not alone in his efforts. Deputy Attorney General Richard Kleindienst, who submitted comments on behalf of the Justice Department in 1969, also suggested that marihuana be included in RICO. *Measures Relating to Organized Crime: Hearings On S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122, and S. 2292 before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 405 (1969).

between the enactment process of Title III and that of RICO with respect to inclusion of marihuana are striking. In both cases, the principal drafter sought to make the bills applicable to offenses involving transactions in "narcotic drugs or marihuana," *compare* Sec. 4 of H.R. 13275, 90th Cong., 1st Sess. [Title III predecessor] *with* Sec. 2(1) of S. 2049, 90th Cong., 1st Sess. (1967) *and* Sec. 2(1) of S. 1623, 91st Cong., 1st Sess. (1969) [RICO predecessors]; both Title III and RICO were sponsored by the same senator (Senator McClellan), and both were processed through the same committee (Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee).

Just as the parallels between the two bills are striking, so is the difference: In Title III, Congress made the wiretap provisions applicable to offenses involving transactions in "*narcotic drugs, marihuana, or other dangerous drugs,*" 18 U.S.C. § 2516(1)(e); in RICO, however, Congress limited the statute's application to only those offenses involving transactions in "*narcotic or other dangerous drugs.*" 18 U.S.C. § 1961(1)(A), (D). The exclusion of marihuana from the provisions of RICO was neither an oversight nor a mistaken belief that it was included in one of the other categories. It was an intentional decision deliberately made:

> Note, there are no [federal] marijuana RICO prosecutions . . . . [The statute includes] narcotics and other dangerous drugs; it does not include marijuana. I don't know that everybody's noticed that, but the . . . language is such that you cannot infer that marijuana is a dangerous drug [under] RICO. There are no federal RICO marijuana prosecutions. There may be some state ones, but there's not going to be any federal ones, and that was a conscious policy choice by the Congressmen involved.

Blakey, *Materials on Rico: Criminal Overview*, 1 Techniques in the Investigation and Prosecution of Organized Crime 24 (Cornell Institute on Organized Crime, Blakey ed. 1980) (alterations in the quotation in original).[7]

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[7] Blakey's statement was made years before this issue was raised in any court of appeals. He was not acting as an advocate, but was instead simply lecturing on RICO's history and application at the

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4. The Significance of RICO's History

As the foregoing history demonstrates, Congress was not writing on a clean slate when it enacted RICO. At the time it was considering both RICO and the Controlled Substances Act, Congress was aware that it had made specific provision for narcotic drugs and marihuana in pre-1970 legislation and that it had treated other drugs subject to criminal regulation as a separate group. These other drugs were the "dangerous drugs" referred to in the 1968 wiretap statute. The wiretap statute expressly included marihuana, thereby demonstrating that Congress recognized that marihuana and dangerous drugs were in different categories, and further demonstrating that when Congress wanted to include marihuana it knew how to do so. Petitioner does not assert that the only way Congress could have included marihuana within RICO was to expressly refer to it. Instead he asserts that, as it had done in the Controlled Substances Act, Congress could simply have used the term "controlled substance" to include marihuana—and all drugs covered by federal law. This Court has already observed that members of Congress who voted for RICO were aware of the Controlled Substances Act. *Russello v. United States*, 104 S.Ct. 296, 301 (1983).

The sole effect of not using the term "controlled substance" in RICO was to eliminate marihuana, and only marihuana, from the coverage of that statute. All other controlled substances are categorized either as dangerous drugs or as narcotic drugs and thus within the definition of racketeering activity.

A contrary construction of RICO which would include marihuana offenses as racketeering acts would permit precisely what Congress sought to avoid. A prosecutor could not bring a RICO charge by alleging as racketeering acts the violation of federal law prohibiting small gifts of marihuana, because such gifts are misdemeanors (21 U.S.C. § 841(b)(4)), and RICO predicate acts must be felonies. 18 U.S.C. § 1961(1)(A), (D). If, however, the prosecutor simply alleged that these small gifts violated a state statute which

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1979 Cornell Institute on Organized Crime summer program on labor racketeering. Professor Blakey stands by his early views. He is of counsel on this petition.

made such deliveries felonies,[8] the defendant could be charged and convicted of RICO violations. Congress could not have intended this perverse result.

Finally, if a construction contrary to that urged by petitioner were correct, large scale marihuana trafficking has been encompassed within RICO, with its 20-year imprisonment penalties, since 1970. However, in 1980, when Congress enacted 21 U.S.C. § 841(b)(6), it did so because "sophisticated trafficking networks" involved in "large scale marihuana trafficking" were subject to a maximum five-year prison sentence under "[c]urrent law." S. Rep. No. 916, 96th Cong., 2d Sess. 14, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2858, 2871. When § 841(b)(6) was discussed in the House, its sponsors recognized that present penalties were inadequate for dealing with "[c]riminal organizations trafficking in large amounts of marihuana." 126 Cong. Rec. 11791 (1980). A network or organization so involved would constitute a RICO enterprise, and those associated with it would be prosecutable under 18 U.S.C. § 1962(c)—yet, at no time, either in the Senate or the House, did anyone suggest that RICO could be applied to those networks or organizations.

Unlike the Court of Appeals, this Court is not foreclosed by a prior decision[9] from examining the background of RICO and the drug reform statutes. The question presented by petitioner is an important one; the intent of Congress warrants the consideration that was refused by the Eleventh Circuit. This Court looked to Congress' intent in *Albernaz v. United States*, 450 U.S. 333 (1981), in interpreting the Controlled Substances Act; it looked to Congress' intent in *United States v. Turkette*, 452 U.S. 576 (1981), and in *Russello v. United States*, 104 S.Ct. 296 (1983), in interpreting RICO.

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[8] At the time RICO was enacted, small distributions of marihuana were felonies in virtually every state, and no exception was made for gratuitous distribution. *See, e.g.*, state statutes collected in The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Narcotics and Drug Abuse*, Appendix B at 129 n.480 (1967).

[9] The Court of Appeals acknowledged the force of petitioner's legislative history argument but held it was "foreclosed" by a prior panel decision and was "not at liberty" to reconsider the issue. 742 F.2d at 1343, App. 4.

Petitioner asks only that the Court look to Congress' intent in his case as well.

B. TWO OFFENSES ARISING FROM THE SAME ACT CANNOT CONSTITUTE A PATTERN OF RACKETEERING ACTIVITY.

Subsection (c) of 18 U.S.C. § 1962 makes it unlawful to conduct or participate, directly or indirectly, in the conduct of an enterprise's affairs through a pattern of racketeering activity. Subsection (d) of the same statute makes it unlawful to conspire to violate the provisions of subsection (c).

Petitioner was convicted of a substantive RICO violation as well as a RICO conspiracy. The Eleventh Circuit acknowledged that the basis for petitioner's RICO conviction arose from a single act: making a downpayment for marihuana that was brought into the United States on an airplane. In connection with this act, the government indicted and convicted petitioner of importation and possession with intent to distribute marihuana. 742 F.2d at 1360, App. 39-40. Petitioner argued in the Court of Appeals that because these two convictions were the result of a single attempt on his part to procure marihuana, he had neither engaged nor conspired to engage in a "pattern" of racketeering activity. The Eleventh Circuit rejected this argument, holding that since possessing and importing marihuana are two separate crimes, they were consequently two separate acts for purposes of the RICO statute. 742 F.2d at 1360-61, App. 40. This holding is contrary to the language of the statute, the intent of Congress and the guidelines promulgated by the Department of Justice.

Section 1961(5) of RICO defines pattern of racketeering activity as requiring:

> at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any

> period of imprisonment) after the commission of a prior act of racketeering activity.

Congress thus limited RICO to temporally separate acts.

The Court of Appeals, however, expressly allowed the same act (the attempted purchase from the Constellation airplane load) to serve as a "pattern." This is not a construction of § 1961(5); it is a rewriting, and the rewriting is not consistent with legislative intent.

The Senate Committee on the Judiciary gave the following explanation of "pattern of racketeering activity" when it reported the RICO bill, S. 30, to the Senate:

> The concept of "pattern" is essential to the operation of the statute. One isolated "racketeering activity" was thought insufficient to trigger the remedies provided under the proposed chapter, largely because the net would be too large and the remedies disproportionate to the gravity of the offense. The target of title IX [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one "racketeering activity" and the threat of *continuing* activity to be effective. It is this factor of *continuity* plus relationship which combines to produce a pattern.

S. Rep. 617, 91st Cong., 1st Sess. at 158 (emphasis added). When the Committee's explanation is applied to petitioner's attempted purchase, it is apparent that his single act is the "sporadic activity" which was not intended as RICO's target.

This Court has not construed the term "pattern of racketeering activity." However, in *United States v. Turkette*, 452 U.S. 576, 583 (1981), the Court analyzed RICO and noted that the government must prove the existence of both an "enterprise" and the connected "pattern of racketeering activity." The Court stated that the enterprise is an entity, but that the "pattern of racketeering activity is, on the other hand, a *series* of criminal acts as defined by the statute." *Id.*

(emphasis added). The term "series" contemplates a continued succession of similar things. *See, e.g., Webster's New Twentieth Century Dictionary* 1656 (2d ed. 1975). Just as petitioner's act does not fit the Senate Committee's concept of "pattern," so does it not fit this Court's language in *Turkette*.

Petitioner's analysis of legislative intent is confirmed by the Justice Department's RICO guidelines. Guideline 9-110.340 clearly indicates that RICO was not intended to reach defendants who have committed but one act, even though that episode might legitimately give rise to more than one criminal charge:

> 9-110.340 No Indictment Shall Be Brought Charging A Violation Of 18 U.S.C. §1962(c) Based Upon A Pattern Of Racketeering Activity Growing Out Of A Single Criminal Episode Or Transaction.
>
> 9-110.341 *Commentary*: The purpose of this guideline is to prevent a pattern of racketeering activity being charged which lacks the attributes which Congress had in mind but which is literally within the statute.

United States Attorney's Manual, Title 9, Criminal Division, §§9-110.340, 9-110.341. These guidelines were in effect at the time petitioner was indicted, and the commentary prepared by the Department of Justice purports to reflect its best judgment as to what Congress intended.[10]

Petitioner does not disagree with the proposition that one act may, on occasion, constitute two separate crimes. He

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[10]The guidelines have been incorporated in the United States Attorney's Manual, Title 9, Criminal Division, §§9-110.310 through 9-110.361. Petitioner is not arguing that the guidelines, by themselves, create a ground for complaint. *United States v. Caceres*, 440 U.S. 741 (1979). However, "[t]he interpretation expressly placed on a statute by those charged with its administration must be given weight by courts faced with the task of construing the statute." *Zemel v. Rusk*, 381 U.S. 1, 11 (1965); *see also Blum v. Bacon*, 457 U.S. 132, 141-42 (1982); *United States v. Ivic*, 700 F.2d 51, 64 (2d Cir. 1983).

merely asserts that one act constitutes only one act. The fact that one act may constitute two crimes will not alter statutory language from "predicate acts" to "predicate crimes."

C. THE WIRETAPS WERE UNLAWFUL.

Petitioner was convicted through wiretap evidence. The facts relevant to the wiretap issues he raises here are these: On January 5, 1979, Stephen Dobson, an agent with the Florida Department of Law Enforcement, sought court authorization to wiretap two telephones listed to Clyde Walton Cobb, the leader of a marihuana trafficking group. A 30-day interception period was granted by a Florida circuit court. On January 15, 1979, Dobson, having learned that Cobb had changed one of his telephone numbers, submitted an application (which was granted) for an order amending the original order and authorizing a tap on the changed number, App. 56. Dobson later learned that the second telephone number had also been changed. On January 29, 1979, he submitted a second application to amend the original order, App. 59, which was also granted. The applications for neither amendment bore evidence of authorization by any official, and neither recited facts derived from new investigation.

1. Applications to Amend Wiretap Orders Must Be Submitted By Authorized Persons.

It was uncontroverted in the Court below that the applications to amend wiretap orders had not been submitted by persons authorized to present such applications. In spite of this clear factual record, the Eleventh Circuit ignored the issue.

Section 2516(2) of Title 18, United States Code, provides that only certain people may present a wiretap application to state courts:

> The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge . . . , may apply to such judge for [a wiretap order].

The corresponding state statute is found at Fla. Stat. Ann. § 934.07 (West Supp. 1974-1983): "The Governor, the Attorney General, or any State Attorney may authorize an application [for a wiretap order]." Thus, it is only the specific, named officeholders who may make an application under federal and state law. Police officers are not included among those authorized.

In the Eleventh Circuit, the government characterized the January 15 and January 29 submissions as something less than full-blown wiretap applications. Since, said the government, these were merely applications to amend an order, the statutes governing full-blown applications were not implicated. This argument was made without reference to supporting precedent, for there is none. Neither the federal nor the Florida statute distinguishes between original applications and amendment applications. Indeed, Florida courts in another context have held that amendments must be justified as if they were new applications.[11]

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[11] *Sarno v. State*, 424 So. 2d 829 (Fla. Dist. Ct. App. 1982); *Bagley v. State*, 397 So. 2d 1036 (Fla. Dist. Ct. App. 1981); *Wilson v. State*, 377 So. 2d 237 (Fla. Dist. Ct. App. 1979).

While this Court has never considered whether the statutes governing original wiretap applications also govern applications to amend wiretap orders, the United States Court of Appeals for the First Circuit discussed this issue in *United States v. Smith*, 726 F.2d 852 (1st Cir. 1984) (en banc). In *Smith*, initial, amendment and renewal applications were submitted by an assistant district attorney empowered by the district attorney to make applications for electronic surveillance orders. 726 F.2d at 856. The Massachusetts statute establishing this procedure was challenged for non-compliance with 18 U.S.C. § 2516(2). *Id.* at 857. The First Circuit upheld the Massachusetts statute because of a "detailed judicial gloss" imposed by the Massachusetts Supreme Judicial Court which brought the facts of that case within the scope of § 2516(2). *Id.*

In reaching its decision, the First Circuit recognized that in the absence of this judicial gloss, "appellants' argument would have formidable force." *Id.* Compliance with the federal statute was found in "[t]he detailed review by a district attorney of *every application* for a proposed use of electronic surveillance." *Id.* at 858 (emphasis added). Proof of such review could be found from the district attorney's signature on the document, and the absence of such a signature required proof of actual authority. *Id.* at 859.

The requirements imposed by the First Circuit upon state applications to amend wiretap orders are entirely consistent with federal practice. In *Smith*, the First Circuit was informed by the office of the United States Attorney for the District of Massachusetts that amendment applications are processed within the Department of Justice in the same manner as applications for original interception orders: They are filed in court by supervising attorneys. Such amendment applications include those where an "investigative agency wishes to obtain authorization to apply for an interception order as to an additional telephone belonging to an individual whose telephone is being or has been tapped." Letter from Tobin N. Harvey, Assistant U.S. Attorney, to Francis

P. Scigliano, Clerk, U.S. Court of Appeals for the First Circuit (Nov. 28, 1983). The Justice Department procedure was explained in response to the Court's request for "a discussion . . . of amendment of existing authority to cover additional telephones belonging to the same or other persons." Letter from Mr. Scigliano to Mr. Harvey (Nov. 16, 1983).

In petitioner's case, the applications for amendment of the original intercept order completely failed to indicate that any person who conceivably could have authorized the applications had done so. This Court has held that the restrictions on persons authorized to approve wiretap requests are central to the statutory scheme of Title III. *United States v. Giordano*, 416 U.S. 505, 527-28 (1974).

The approval by the Eleventh Circuit of these applications to amend wiretap orders is squarely in conflict with the resolution of this issue by the First Circuit in *Smith*. This Court should grant certiorari to resolve this important conflict between the circuits.

2. Applications to Amend Wiretap Orders Must State Probable Cause For The New Order

As noted earlier, *see supra* p. 15, Florida law enforcement agents learned that Clyde Walton Cobb had changed the numbers of the telephones which were targeted in the January 5, 1979 intercept order. They then sought and secured amended orders authorizing interception of the new telephone. In his January 15 application for an order amending the January 5 order, the Florida agent alleged as follows:

> 1. He is the same Stephen S. Dobson who swore to the Affidavit and Application for an Order Authorizing the Interception of Wire and Oral Communications on Telephone Numbers (305) 931-8116 and (305) 944-2184. An Order Authorizing the Interception of Communications on the above numbers was entered by this Court on January 5, 1979 and is attached hereto as "Exhibit A",

made a part hereof and incorporated by specific reference thereto.

App. 56. This same pattern was repeated on January 29, 1979, with reference to another telephone at the same location. App. 59. In both instances, the agent merely relied on the previously entered order instead of presenting a new showing of probable cause.

In the Eleventh Circuit, petitioner asserted and the government contested that resolution of this issue should be governed by Florida law. He argued that three decisions of the intermediate Florida court of appeals required a new showing of probable cause and prohibited a procedure by which amendment applications were justified on the basis of a probable cause showing in the original application.[12] The Eleventh Circuit agreed with petitioner and held that "the requirements of state and federal law govern a federal district court's determination of the validity of wiretap warrants obtained by state law enforcement officers in state courts." 742 F.2d at 1347. However, the Court went on to hold that the Florida decisions upon which petitioner relied were distinguishable because the amendment applications there revealed that the target of the intercept order had not only changed telephone numbers but also changed residences, while in petitioner's case, the target had maintained his residence and changed only his telephone numbers.

There is no Florida case discussing facts similar to those in petitioner's case.[13] Nonetheless, the Eleventh Circuit

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[12] *See* cases cited *supra* note 11.

[13] One of the defendants at petitioner's trial was Patrick C. Waldrop whose conversations were intercepted pursuant to the same wiretap orders. His petition for certiorari is pending in this Court. Waldrop has filed a Complaint for Injunctive Relief in the Circuit Court for the 11th Judicial Circuit of Florida seeking to prohibit further disclosure and use of these intercepted conversations upon the grounds that the wiretap orders were entered in violation of Florida law. *Waldrop v. Dempsey,* Case No. 85-00845

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predicted what Florida courts would do if faced with that situation, held that the Florida courts would recognize the distinction, and denied petitioner relief on this wiretap issue.

In his petition for rehearing and suggestion of en banc consideration, petitioner noted the absence of Florida precedent on this issue and, consistent with routine federal practice, asked the Eleventh Circuit to certify the controlling question to the Florida Supreme Court. Rehearing and en banc consideration were denied.

In refusing to certify this issue, the Eleventh Circuit deprived the Florida Supreme Court of an opportunity to take a "first look"[14] at this important issue of state law. Given the absence of Florida precedent, the Eleventh Circuit's failure to certify so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's powers of supervision. *Greene v. Massey*, 706 F.2d 548, 550 & n.5 (5th Cir. 1983), *cert. denied*, 104 S.Ct. 718 (1984).

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(Fla. Cir. Ct. filed Jan. 8, 1985). In his complaint Waldrop alleges that the unlawfulness of the interceptions arises from the same defects which are alleged in this petition.

[14] *J.R Distributors, Inc., v. Eikenberry*, 725 F.2d 482, 488 (9th Cir. 1984), *probable jurisdiction noted*, 105 S.Ct. 76 (1984).

D. THE GOVERNMENT DENIED PETITIONER DUE PROCESS AND VIOLATED THE SPIRIT OF THE FEDERAL RULES OF APPELLATE PROCEDURE IN MISREPRESENTING CRITICAL PORTIONS OF THE TRIAL RECORD TO THE COURT OF APPEALS AND IN FAILING TO CORRECT ITS MISREPRESENTATIONS EVEN AFTER THEY WERE IDENTIFIED AND THEIR SIGNIFICANCE WAS OBVIOUS.

As noted earlier, the government had evidence which, if believed by a jury, might have supported some convictions on marihuana-related offenses. The argument that Hobson made to the Court of Appeals was as follows:

> (1) The fact that the government has evidence which, if believed, might warrant a conviction on *some* charge does not mean that the government is entitled to convict on *any* and *all* charges; and (2) The fact that the government has evidence which, if believed, would prove involvement in marihuana purchases does not mean that an appellate court should blink its responsiblility to assure that the proof offered by the government actually supports the convictions it obtains. (Russell Hobson's Petition for Rehearing and Suggestion of En Banc Consideration, at 3-4.)

Count 1 charged petitioner with a RICO conspiracy involving an enterprise which consisted of individuals associated in fact for the purpose of importing and distributing marihuana. Count 2 charged him with a substantive RICO violation for associating himself with this enterprise and committing two acts of racketeering. Count 3 charged a conspiracy to import marihuana. Count 4 charged petitioner with importing marihuana aboard a Constellation aircraft. With respect to all of these counts, petitioner argued that, although the evidence might have warranted the conclusion that he purchased and attemped to purchase marihuana, there was no evidence that he knew that the marihuana was imported nor that he ever joined a conspiracy or associated

himself with a group for the purpose of furthering importation of marihuana. The Court of Appeals rejected the argument with the following reasoning:

> There is . . . no question that Hobson and Waldrop's co-defendants were aware that the marijuana was imported. In light of the massive quantity of marijuana involved, the frequency with which . . . Hobson had occasion to deal with the other members of the enterprise, the fact that Hobson, Waldrop and Cobb were described as the principal organizers of the Constellation episode in which marijuana was to be delivered by airplane from Colombia to southern Florida, and the presence of . . . Hobson . . . at various of the organization's stash houses on numerous occasions, the jury was warranted in finding that Hobson . . . knew the marijuana was imported.

742 F.2d at 1360, App. 39.

This was the reasoning the Court of Appeals used to affirm the convictions involving importation. The undeniable truth is, however, that there was no evidence to support the facts asserted. The government misrepresented a lengthy multi-defendant record to the Court of Appeals, and that Court accepted the representations. The government asserted to the Court that Hobson "stood by awaiting the completion of the counting and weighing, after which they immediately removed sizable portions of the massive loads." (Government Brief, at 137.) This assertion is a complete misrepresentation of fact. There is no such evidence in the record. The government compounded this horrendous misstatement by further telling the Court of Appeals that Hobson was constantly ready to take charge of large quantities of marihuana. (Government Brief, at 137.) The testimony—produced by the government and uncontradicted—was that Hobson purchased marihuana once (according to Abbey who kept the records) or twice (according to Cobb), but no more than

twice.[15] Having misstated the record on fundamental points, the government then claimed that with respect to the marihuana for which Hobson had paid a downpayment, he knew the "specific delivery plans." In truth, the government's evidence, uncontradicted at trial (and supported by a tape that the government played) was that Hobson did not know how the marihuana was to be delivered. He was told by Cobb to go to a restaurant to which Cobb planned to dispatch one of his agents in order to lead Hobson to the place where the marihuana was to have been found. No witness testified that Hobson had any idea of how the marihuana was to be moved to this place, if it was to be moved at all. Certainly, no witness testified that any person ever mentioned importation or territory outside the United States to Hobson.[16]

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[15] The government adduced some evidence at trial to suggest that there was a relationship between Hobson and Waldrop—*i.e.*, that they might have been partners as to some matters. However, the government never sought to develop this at trial and did not ask the trial judge to instruct the jury on any vicarious liability theory that would have linked Hobson and Waldrop.

[16] The Court of Appeals noted that the amount of marihuana involved in various transactions was large. This cannot support an inference that someone like Hobson would have known that the marihuana was imported, however. Nor will the facts of this case allow a finding of knowledge of importation based on the amount of marihuana purchased. *See United States v. Watkins*, 662 F.2d 1090, 1098 (4th Cir. 1981), *cert. denied*, 455 U.S. 989 (1982); *United States v. Miranda*, 593 F.2d 590, 597 (5th Cir. 1979); *United States v. Soto*, 591 F.2d 1091, 1104 (5th Cir.), *cert. denied*, 442 U.S. 930, 444 U.S. 845 (1979); *United States v. Maslanka*, 501 F.2d 208, 216 (5th Cir. 1974), *cert. denied*, 421 U.S. 912 (1975). Although precise figures for the indictment period do not exist, DEA domestic marihuana production figures reflect that the marihuana involved in the Constellation load was slightly more than .5% of the domestic marihuana eradicated in 1982. *See* DEA Cannabis Investigation Section, U.S. Dept. of Justice, *Domestic Marijuana Eradication/ Suppression Program—Final Report* at 6 (Dec. 1982). The

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The government even went so far as to state to the Court of Appeals that Hobson was present when certain marihuana arrived at a site and that he received some of the marihuana, and the government claimed that this supported Count 4 of the indictment. (Government Brief, at 139.) In truth, Count 4 of the indictment had nothing to do with the site the government mentioned, and no one testified at trial that Hobson had anything to do with the marihuana mentioned in the government's brief. This was a false statement, pure and simple.

Although there are additional, important misstatements, no other single misstatement is as important as the one relied upon by the Court of Appeals in concluding that Hobson could be convicted of conspiracy to possess marihuana with the intent to distribute. The Court of Appeals acknowledged the well-established principle that "the existence of a simple buyer-seller relationship alone does not furnish the requisite evidence of a conspiratorial agreement." 742 F.2d at 1359, App. 37. However, it sustained Hobson's conviction on the basis of the government's assertion that Hobson was a purchaser on numerous occasions. As noted above, this assertion had no support in the uncontradicted evidence that the government offered at trial. Hobson had purchased once or, at the most, twice.

Before the Court of Appeals decided the case, petitioner filed a reply brief in an effort to point out the flagrant misstatements of fact that filled the government's brief in the sections relating to him. The government made no response at all.[17] In this multi-defendant case, the Court of

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marihuana eradicated by the DEA, of course, bears little relationship to the quantity of domestic marihuana in this country. For example, the DEA in 1982 destroyed 38% more domestic marihuana than it had previously believed to exist. *Id.*

[17] All of the relevant record cites were offered in petitioner's reply brief and petition for rehearing in the Court of Appeals.

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Appeals apparently chose to rely on the government's assertions, perhaps believing that it could trust the government's good faith and that the government had a better sense of the record than a appellate court could obtain. The Court of Appeals trusted the government too much. When its opinion was handed down, petitioner attempted in his petition for rehearing to correct the government's errors. Meanwhile, the government remained silent.

Petitioner sincerely believes that if this Court will ask the Solicitor General to respond to this petition, the Solicitor General inevitably must concede the misstatements described herein. Petitioner asks this Court to consider whether the use of misstatements of fact in a lengthy case in which the Court of Appeals is likely to rely heavily upon government representations as to the record is different in principle from misstatements of the truth at trial, which this Court condemned in *Mooney v. Holohan*, 294 U.S. 103 (1935), and *Napue v. Illinois*, 360 U.S. 264 (1959).

Had the government promptly corrected its misstatements, petitioner might readily accept an explanation that the brief on appeal was faulty through inadvertence. But, when the government had three opportunities to respond to petitioner's identification of the misstatements (reply brief, petition for rehearing and oral argument) and it chose to keep silent, the inference must be that the government believes it has no obligation to correct its own false statements concerning a trial record. Petitioner asks this Court to grant the petition to consider whether, under *United States v. Agurs*, 427 U.S. 97 (1976), the government denies a defendant due process when it refuses to correct plain misstatements of fact that have been clearly and specifically brought to its attention as part of the appellate process.

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Moreover, the government contested none of petitioner's corrections at oral argument.

In another case, this Court might presume that the Court of Appeals made its own independent check of the record to verify the accuracy of the government's statements. But in the instant case, the government made this virtually impossible, and certainly impracticable, by neglecting to provide record references for the key factual assertions used by the Court of Appeals to affirm petitioner's convictions. Surely, it is not reasonable to assume that the Court of Appeals on its own would have canvassed the entire record to verify each unsupported factual assertion. The only plausible assumption is that it relied upon the government and the presumption that officials do their work in good faith.

Petitioner asks this Court to consider not only the due process implications of the government's conduct, but also whether that conduct violated Rule 28(a)(3) of the Federal Rules of Appellate Procedure. That rule requires a party to make "appropriate references to the record" in its statement of the facts. In the instant case, the government chose to make its "statement of the facts" throughout the brief, not simply at the outset. Yet, it declined to support with relevant citations statements made with respect to petitioner. Petitioner urges this Court to consider whether a court of appeals has an obligation to call upon a party—any party, including the government—to support factual assertions once an opposing party has filed a brief or petition, supported by counsel's signature, which calls into question the factual representations made to a federal court. Petitioner further urges this Court to consider whether the government has an obligation *sua sponte* to respond with citations to the record when a defendant alleges that the government has made specific misstatements and the government has not previously cited to the record to support its statements.

This is no small issue. This Court has promulgated amendments to the rules of civil procedure that are designated to assure that attorneys are forthcoming in their representations to federal courts. *See, e.g.*, Fed. R. Civ. P. 11. Can the duty of counsel be less in the courts of appeals than

in the federal district courts? If not, petitioner asks this Court to invite the Solicitor General to respond to this petition. Once the misstatements of fact by the government are acknowledged, petitioner prays that if his convictions are not set aside on the basis of the other five questions presented that this Court remand the sufficiency of evidence questions on all counts to the Court of Appeals for reconsideration in light of an accurate statement of facts.

E. THE GOVERNMENT'S MISREPRESENTATIONS DEPRIVED PETITIONER OF HIS CHOICE OF COUNSEL.

Two months prior to petitioner's trial, the court held a hearing on the government's motion to disqualify his counsel, Clyde M. Taylor. During a lengthy colloquy with petitioner, the trial court identified specific problems that might result if Taylor were to continue his representation. The judge included the possibility that the jury might infer petitioner's guilt from the potential testimony of two government witnesses, Robinson and Alexander, who implicated Taylor in criminal conduct, claiming that he knew they had discussed unloading marihuana. The trial court advised petitioner that Taylor's continued representation would not be in petitioner's best interest. Despite these warnings, petitioner repeatedly acknowledged his understanding of the potential conflicts and expressed his desire to be represented by Taylor.

The district court disqualified Taylor. Its decision was affirmed by a divided panel in *United States v. Hobson*, 672 F.2d 825 (11th Cir.), *cert. denied*, 459 U.S. 906 (1982), which noted that the disqualification order was "based factually upon affidavits of two witnesses, Robinson and Alexander, whom the government represents will testify in Hobson's upcoming trial." 672 F.2d at 826.

By the pleadings which it submitted to the district court, the government sought to create the expectation that two of

its witnesses would testify to events requiring disqualification of petitioner's counsel. Its efforts were successful. The trial judge, believing that such testimony would be presented, ordered disqualification: "Once testimony about Taylor's involvement came before the jury its members could not help but wonder if the lawyer is protecting himself or his client." When petitioner appealed this disqualification pretrial, the Court of Appeals similarly believed the government's submission and assumed that the testimony would be adduced:

> [I]t is reasonable to expect that [witnesses Robinson and Alexander] will testify as to the same allegations made in their affidavits. This testimony will portray Hobson's attorney . . . and . . . will impugn severely his integrity and credibility in the eyes of the jury.

672 F.2d at 828.

It was not until the government had presented its case that the trial judge realized he had been misled, for the government did not present such testimony.[18] By then, of course, it was too late for petitioner. He had gone to trial without counsel of choice and had been sentenced to 35 years in prison.

Petitioner would not seek a writ of certiorari on this issue if the government had fulfilled the expectations which it created. He recognizes that there are circumstances in which it is appropriate for a judge to disqualify counsel of choice

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[18] The same judge in a subsequent trial of other defendants, but involving the same witnesses and the same incidents, refused to disqualify the same lawyer upon the same government submission, noting the earlier failure to produce the testimony:

> THE COURT: Well, that's what I'm wondering. In the last case Robinson and Alexander were witnesses and did testify. They did not testify anything concerning the discussion they had, alleged to have been had with Taylor in his office. [sic]

United States v. Acosta, No. MCR 82-220 (N.D. Fla. 1982), Transcript of October 7, 1982, Volume II at 5.

based upon the government's representation that it will adduce testimony implicating the lawyer. However, when the government fails to introduce such testimony, and further fails to explain its absence, a defendant's Sixth Amendment right to counsel of choice has been violated.

A defendant who has been victimized by the government's manipulation of his choice of counsel has no pretrial appellate remedy. *Flanagan v. United States*, 104 S.Ct. 1051 (1984). Because of this, it is imperative that the federal appellate courts closely examine the government's good faith in bringing such motions. In this case the Court of Appeals ignored the issue when petitioner sought reconsideration on his direct appeal.

Government motions to disqualify experienced defense counsel[19] are becoming an everyday occurrence, and the government's primary motive in bringing such motions has been repeatedly questioned. *See, e.g.*, Margolin & Coliver, *Pretrial Disqualification of Criminal Defense Counsel*, 20 Am. Crim. L. Rev. 227 (1982). This Court has never discussed a defendant's remedy when his counsel of choice has been improperly disqualified. Petitioner's case provides the ideal vehicle for such consideration because of the clear expressions of reliance by the trial and appellate courts upon the false expectations which the government deliberately created.

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[19] In its January 20, 1982 disqualification order, the trial court recognized petitioner's desire to be represented by experienced counsel:

> Hobson's desire to retain Mr. Taylor is understandable. Mr. Taylor is familiar with many of the crimes and overt acts charged in the indictment. In fact he has successfully represented defendants involved in them. He is an effective attorney.

CONCLUSION

Petitioner has presented this Court with the opportunity to address substantial questions. None of his claims turns upon contested facts; all raise only issues of law.

These issues require this Court's attention. They relate to events which not only occur frequently but also have a major impact on our system of justice. Petitioner's RICO and wiretap arguments arise under statutes which are invoked on a daily basis; yet, the questions he raises have never been addressed by this Court. The issue relating to disqualification of counsel is, admittedly, case specific, but the rule which will come from this Court's resolution will have broad application.

Russell Hobson III asks this Court to accept his petition and review these questions of major importance.

Respectfully submitted,

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APPENDIX

APPENDIX 1

UNITED STATES of America,
Plaintiff-Appellee,

v.

Antonio E. BASCARO, Partick M. Waldrop, Russell Hobson, III, Manuel Eric Villanueva, Gustavo J. Fernandez, Manuel W. James, Defendants-Appellants.

UNITED STATES of America, Plaintiff-Appellant, Cross-Appellee,

v.

Manuel W. JAMES, Defendant-Appellee, Cross-Appellant.

Nos. 82-5547, 82-6043.

United States Court of Appeals,
Eleventh Circuit.

Oct. 1, 1984.

Appeals from the United States District Court for the Northern District of Florida.

Before HENDERSON and CLARK, Circuit Judges, and ATKINS* District Judge.

CLARK, Circuit Judge:

Appellants were tried and convicted in the Northern District of Florida on drug conspiracy charges. Their convictions are founded upon a series of incidents taking place in

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* Honorable C. Clyde Atkins, U.S. District Judge for the Southern District of Florida, sitting by designation.

1977 and 1978, involving the importation of massive quantities of marijuana into the United States from Colombia, South America.[1]

Generally stated, the appellants, together with six other individuals (four of whom have either pled guilty or been separately tried and convicted, and two of whom remain fugitives), were charged in a thirty-count indictment in connection with their alleged involvement in a drug smuggling ring. Evidence adduced at trial indicates that appellants Bascaro and Villanueva, together with one Jose Acosta, who was separately tried and convicted, were the organizers and principal decision makers of the enterprise. Appellant Fernandez was responsible for overseeing the purchase of vessels to haul marijuana, and the hiring of crews to operate such vessels. Marijuana procured in Colombia and brought into the United States on board various vessels was purchased by appellants Hobson and Waldrop, among others, from an unindicted co-conspirator, Bill Cobb. Appellant James, an attorney, was the functional equivalant of "house counsel" for the group; James furnished legal advice, prepared documentation on fishing vessels owned by organization participants, and represented group members in criminal matters arising in connection with enterprise dealings.

James was convicted on one count only—conspiracy to possess marijuana with intent to distribute.[2] All other defendants were found guilty of conspiracy to violate the Racketeering Influenced and Corrupt Organizations Act (RICO)[3]; completed RICO substantive offenses[4]; conspiracy to import marijuana[5]; possession of marijuana with intent to

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[1] One co-conspirator who turned state's evidence estimated the quantity of marijuana imported during the time of his involvement with the defendants as between .75 and 1.5 million pounds.

[2] 21 U.S.C. §§ 841(a); 846.

[3] 18 U.S.C. § 1962(d).

[4] 18 U.S.C. § 1962(c).

[5] 21 U.S.C. §§ 952(a); 963.

distribute[6] (Bascaro—four counts; Villanueva, Fernandez and Waldrop—two counts; Hobson—one count); and with the exception of Bascaro, conspiracy to possess marijuana with intent to distribute.[7] In addition, Bascaro and Villanueva were convicted of engaging in a continuing criminal enterprise,[8] and interstate travel in aid of racketeering enterprises,[9] and Hobson and Waldrop were convicted of importing marijuana.[10]

The appellants raise a myriad of issues on appeal, a number of which have been adopted by some or all defendants, and others that apply only to one or two defendants in particular. We shall first address those issues common to all or nearly all appellants.

Common Issues

I. In General—Marijuana Related Offenses as a Basis for Prosecution Under RICO

The Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962, makes it unlawful to conduct or participate in the conduct of an enterprise affecting interstate commerce, through a pattern of racketeering activity, and also makes it a crime to conspire to do so. Racketeering activity is defined in terms of a laundry list of offenses, including "the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in *narcotic or other dangerous drugs,* punishable under any law of the United States." 18 U.S.C. § 1961(1)(D) (emphasis supplied).

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[6] 21 U.S.C. § 841.

[7] 21 U.S.C. §§ 841(a); 846.

[8] 21 U.S.C. § 848.

[9] 18 U.S.C. § 1952.

[10] 18 U.S.C. § 952(a).

Joining appellant Hobson in his brief to this court is G. Robert Blakey, a professor of law at Notre Dame and a principal drafter of the RICO statute. Professor Blakey argues that marijuana offenses do not qualify as racketeering activity under RICO, because Congress did not intend the phrase "narcotic or other dangerous drugs" to include marijuana offenses. In support of his position, he points out that proposed drafts of the Act, listing marijuana in addition to narcotic and other dangerous drugs, were considered but ultimately rejected, and that in the federal wiretap statute, which Professor Blakey also had a hand in drafting, wiretaps were authorized for suspected offenses involving "narcotic drugs, *marihuana,* or other dangerous drugs." 18 U.S.C. § 2516(e) (emphasis supplied). Since Congress separately listed marijuana alongside narcotic or other dangerous drugs in the wiretap statute, its failure to do so in the RICO statute, the argument goes, reflects a congressional intent to exclude marijuana offenses from coverage under the Act.

Our consideration of the appellants' argument is foreclosed by *United States v. Phillips*, 664 F.2d 971 (5th Cir. Unit B 1981). In *Phillips*, as here, it was argued that RICO did not apply to marijuana offenses. The holding in *Phillips* was explicit: "Marijuana may be the subject matter of a RICO charge," *Phillips* 664 F.2d at 1040. The appellants argue that *Phillips* is not controlling, because there, the basis for the defendant's claim was that marijuana is neither a narcotic nor a dangerous drug in fact, whereas here, the claim is grounded in legislative history and intent. However, the mere act of proffering additional reasons not expressly considered previously for accepting a particular statutory interpretation that has been explicitly rejected by a panel of our court, will not open the door to reconsideration of the question by a second panel. In short, *Phillips* held that marijuana *may* be the subject matter of a RICO charge; we are not at liberty to hold that it may not.

II. Issues Relating to Matters Arising Prior to Trial

A. The Wiretap

On January 5, 1979, Florida law enforcement agent Stephen Dobson applied for and received authorization from a Florida circuit court judge to intercept telephone conversations on two telephones listed to unindicted co-conspirator Bill Cobb, for a period of thirty days. Within that thirty-day period, Cobb had the numbers on both of his telephones changed; the telephone company refused to intercept the new numbers without new court orders, and so Dobson returned to court on January 15 and 29 and obtained amendments to the January 5 order, substituting the new numbers for the old. On February 2, 1979, Dobson applied for and was granted a thirty-day extension of the amended January 5 authorization, and it was during the extension period that certain telephone calls were intercepted incriminating several of the appellants.

1. Newly discovered evidence that the wiretap order was issued on the basis of false information

The appellants' initial challenge respecting the sufficiency of the wiretap application concerns what might best be termed "newly discovered evidence." Dobson's original affidavit relied in part upon information obtained from an informant, Rayburn Morgan. In the affidavit, Dobson alleged that he interviewed Morgan on December 5, 1978, and credits Morgan with having furnished certain details of Cobb's involvement in the marijuana conspiracy prior to July 1978.

In April 1983, several months after the conclusion of trial and while this appeal was pending, the defendants located Rayburn Morgan, and obtained his affidavit. Morgan stated that he did not make "many" of the statements attributed to him in the Dobson affidavit, and listed those statements with which he took issue. He added that he had reason to believe Cobb intended to kill him, for which reason he had been in

hiding since the spring of 1978, and had made himself unavailable to all but the government prosecutors.

On the basis of this newly discovered evidence, appellants insist that the Dobson affidavit failed to establish the probable cause needed to authorize a wiretap on Cobb's phone. Consequently, appellants continue, this court should remand the case to the district court, presumably for a determination of whether a new trial is in order.

Evidence discovered post-trial, calling into question the existence of probable cause for a search conducted by law enforcement officers, is properly considered by the district court in a motion for a new trial pursuant to Fed.R.Crim.Pro. 33. *See, e.g., United States v. VanMaanen*, 547 F.2d 50, 52-53 (8th Cir.1976). Rule 33 provides, however, that where, as here, such a motion is filed with the district court during the pendency of an appeal, the motion may be denied but may not be granted without first having the case remanded by the court of appeals. *United States v. Fuentes-Lozano*, 580 F.2d 724 (5th Cir.1978); *see generally* C. Wright, *Federal Practice and Procedure* § 557 (1982).

For our part, a court of appeals is without authority to rule on a motion for a new trial. *United States v. Boberg*, 565 F.2d 1059, 1062 (8th Cir.1977). We must nevertheless decide whether to remand the case for the limited purpose of having the district court entertain such a motion, and if remanding the case would serve no valid purpose, we will decline to do so. *United States v. Mack*, 695 F.2d 820, 823 (5th Cir.1983).

For the appellants to prevail in the district court on a motion for a new trial based upon newly discovered evidence, they must demonstrate, among other things, that the new evidence is such that it will probably produce an acquittal. *Bentley v. United States*, 701 F.2d 897 (11th Cir.1983); *United States v. Hirst*, 668 F.2d 1180, 1185 (11th Cir.1982). In order for such a result to be likely in this case, appellants must demonstrate, at the very least, that suppression of the wiretap evidence was warranted in light of information

contained in Morgan's affidavit. Because we do not believe that the affidavit alone could properly result in suppression of the wiretap, it is unnecessary to remand the question to the district court for its consideration.

In *Franks v. Delaware*, the Supreme Court summarized the standard applicable for determining whether a defendant is entitled to a hearing upon his allegation that a search warrant was issued on the basis of a false affidavit:

> There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any non-governmental informant. Finally, *if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.* On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing.

438 U.S. 154, 171-72, 98 S.Ct. 2674, 2684-85, 57 L.Ed.2d 667 (1978) (footnote omitted) (emphasis supplied).

Assuming without deciding that Morgan's affidavit supports a claim of deliberate falsehood, and setting aside all reference in Dobson's affidavit to the Morgan interview (which would be unnecessary even if everything in Morgan's affidavit was taken as true, given that Morgan makes it clear, at least by implication, that he does not question all statements attributed to him), the information remaining would still be sufficient to sustain a probable cause determination. In support of his application for wiretap, Agent Dobson furnished forty-six pieces of information tending to link Bill Cobb to an ongoing marijuana conspiracy. Of those forty-six items, only seven had any connection to Rayburn Morgan. The remaining thirty-nine detail the circumstantial evidence amassed pointing to the conclusion that Cobb was deeply involved in a drug conspiracy: a pattern of telephone calls to and from Cobb's residence to other suspected co-conspirators at times when marijuana smuggling ventures were coming to fruition; Cobb's purchase, ownership or use of several items of real and personal property employed by suspected co-conspirators to house and transport themselves and their marijuana; and details of an ongoing drug investigation in Maryland involving Cobb, among others, culminating in an arrest of several of the participants.

While no one item of information recounted above might have been sufficient standing alone to justify a wiretap order, taken together, they amply set out probable cause to believe that Cobb was involved in a marijuana conspiracy. Because probable cause to issue the wiretap order existed irrespective of information allegedly obtained from Morgan, the statements credited to Morgan, whether true or false, could not alter the trial court's determination that probable cause existed to authorize a wiretap. We therefore find it unnecessary to remand the question to the lower court for an evidentiary hearing.

2. The initial wiretap application and the staleness of information supporting probable cause

The appellants' second objection to the wiretap is that the application for authorization was supported by stale information. It is their contention that even if Dobson's affidavit amply demonstrated Cobb's involvement in the conspiracy through June of 1978, it failed to provide probable cause to believe that he continued to be involved when the wiretap was authorized seven months later.

Information contained in Dobson's affidavit relating to Cobb's involvement in the conspiracy after June, 1978, is as follows: The affidavit indicated that from July through November 1978 a consistent pattern of telephone calls continued to be made from Cobb's telephones to persons previously linked to the conspiracy. In that time, Cobb changed his principal residence and telephone numbers several times, which Dobson indicated in his experience was a common practice of persons engaged in illegal operations, done in an effort to impede detection by law enforcement personnel. Finally, on November 24, a slip of paper was found in the pocket of one James Posey, at the time of his arrest in connection with a smuggling operation linked to the conspiracy previously connected to Cobb, on which was written Cobb's telephone number, and the message: "Bill called—emergency 1:30 (expletive deleted) panic."

It remains a fundamental principal of search and seizure law that information furnished in an application for a search warrant must be timely, and that probable cause must be found to exist "at the time the warrant issues." *United States v. Hyde*, 574 F.2d 856, 864 (5th Cir.1978). A warrant application based upon stale information of previous misconduct is insufficient, because it fails to create probable cause that similar or other improper conduct is continuing to occur. *United States v. Weinrich*, 586 F.2d 481, 491 (5th Cir. 1978).

No mechanical test exists for determining when information becomes fatally stale; rather, "staleness is an issue

which must be decided on the peculiar facts of each case." *Hyde*, 574 F.2d at 865; *Weinrich*, 586 F.2d at 491.

> In general, the basic criterion as to the duration of probable cause is the inherent nature of the crime. The circuits hold that where an affidavit recites a mere isolated violation then it is not unreasonable to believe that probable cause quickly dwindles with the passage of time. On the other hand, if an affidavit recites activity indicating protracted or continuous conduct, time is of less significance.

Bastida v. Henderson, 487 F.2d 860, 864 (5th Cir.1973). Protracted and continuous activity is inherent in large-scale drug trafficking operations. *United States v. Tehfe*, 722 F.2d 1114, 1119 (3d Cir.1983). In such cases, then, the staleness issue should be construed liberally. *Id.* at 1120.

In light of the liberal treatment properly accorded the staleness issue in a large drug conspiracy operation such as this, evidence of Cobb's continued complicity in the marijuana conspiracy in the seven months preceding the application was sufficient to support a finding of probable cause to authorize the wiretap. While the telephone message from Cobb found in Posey's pocket, the calls made from Cobb's telephones, and changes in Cobb's address and telephone numbers are subject to an innocent interpretation when viewed in isolation, in light of the ongoing investigation and Cobb's preexisting involvement with the conspiracy, such additional circumstantial evidence lent adequate basis for a probable cause determination that Cobb remained a part of the conspiracy and that his telephone was being used in connection with that conspiracy at the time the wiretap application was submitted. *United States v. Todisco*, 667 F.2d 255, 258 (2d Cir.1981).

3. The amended wiretap application and its sufficiency under federal and state law

The appellants' final objection to the wiretap concerns the sufficiency of the January 15 and 29 applications for amendment of the January 5 authorization order. They argue that the amendment applications violated Florida law, in that they improperly incorporated by reference documents relating back to the original January 5 application.[11]

Before the January 5 order had been acted upon and the wiretap was in place, Cobb had one of his telephone numbers changed. Consequently, on January 15, Dobson returned to the circuit judge who had issued the original order, and applied for an amended order reflecting the new telephone number. In his affidavit in support of the application for amendment, Dobson attached a copy of the original wiretap order, incorporated it by specific reference, and explained why that order needed to be amended. The court thereupon issued the amended order. A nearly identical sequence of events occurred later in the month; Cobb had the number on his second telephone changed, Dobson returned to court on January 29 with an application to amend the January 5 order, and the court amended its order accordingly.

The first question to be answered is whether federal or state law governs a federal district court's ruling in a federal drug conspiracy case on the sufficiency of a wiretap application approved by a state court and submitted by a state law enforcement agent. Both the United States and the state of Florida have enacted wiretap authorization statutes. *See* 18

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[11] To the extent that the amendment application cannot "piggyback" on the original, appellants make the related argument that the amendment was not properly authorized, in that only the original was officially approved by an appropriate state official.

U.S.C. § 2510 *et seq.*; FSA §§ 934.01 *et seq.* Title 18 U.S.C. § 2516(2) provides in pertinent part:

> The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter *and with the applicable State statute* an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made . . .

(emphasis supplied). Two courts of appeals have expressly held that the federal statute requires federal courts to defer to state law on the question of the validity of wiretap orders obtained in state court by state law enforcement agents, to the extent that state requirements are the more rigorous. *United States v. McNulty*, 729 F.2d 1243, 1264 (10th Cir.1984) (en banc); *United States v. Marion*, 535 F.2d 697 (2d Cir.1976). In *United States v. Nelligan*, our court tacitly approved "the Second Circuit's conclusion that state law governs the validity of state warrants issued by state courts" as an exception to "the general rule that federal law governs the admissibility of wiretap evidence in federal criminal cases." 573 F.2d 251, 254 (5th Cir.1978). We agree with the interpretation given the statute by our brethren in the Second and Tenth Circuits, and therefore make explicit what was only implicit in *Nelligan:* that the requirements of state and federal law govern a federal district court's determination of the validity of wiretap warrants obtained by state law enforcement officers in state courts.

As previously noted, the state circuit court approved Agent Dobson's applications to amend the original January 5 wiretap authorization order, on the basis of affidavits that

incorporated by reference the January 5 order and stated that an amendment to that order was necessary because the subject of the wiretap had changed his telephone number. The appellants do not suggest that this procedure would run afoul of federal law, but contend that it did violate the more rigorous Florida requirements. In support of their position, appellants have brought to our attention two Florida court of appeals decisions applying the state wiretap statute, and invalidating wiretap order amendment applications that incorporated by reference documents from the original application. *Bagley v. State*, 397 So.2d 1036 (Fla.App.1981); *Wilson v. State*, 377 So.2d 237 (Fla.App. 1979).

In both *Wilson* and *Bagley*, the original wiretap applications submitted by the state were sufficient in all respects and were properly approved. Among the requirements satisfied, was that the applicant furnish "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous"—a requirement common to the Florida and federal statutes. § 934.09(1)(c), Fla.Stats.; 18 U.S.C. § 2518(1)(c). Before the thirty-day time period on the original orders had run, the subjects of the wiretaps in *Bagley* and *Wilson* changed residence and telephone number, forcing the state to return to court with applications to amend the existing orders. In neither amendment application did the state reassert that other investigative procedures continued to be too dangerous or unlikely to succeed. Rather, they simply incorporated by reference statements to that effect from the original application.

The Florida courts of appeals held that the amendment applications were insufficient. The rationale for that conclusion, implicit in both opinions, is that when a suspect changes residence, the circumstances that previously made other investigative procedures dangerous or unlikely to succeed may no longer exist, thus requiring the state to assert new facts in its amendment application demonstrating that

conventional investigative techniques continue to be dangerous or ineffective. As the *Bagley* court observed: "In the original application for wiretap, the affiant declared that it was difficult to surveil Bagley's residence because there were no positions the affiant could sit without being detected. The amendment makes no reference at all to the success or failure of the surveillance techniques employed at the new location. The amendment also fails to state why routine methods of surveillance could not be used at the new location." 397 So.2d. at 1038.

Unlike the subjects of the wiretaps in *Bagley* and *Wilson*, Cobb changed only his telephone number. As distinguished from a change in residence, a change in telephone number only could not conceivably have affected the efficacy of alternative investigative techniques. Nor in the context of this case could such a change call into question the continued existence of probable cause—to the contrary, in his initial application, Agent Dobson pointed to Cobb's frequent changes in telephone number as evidence of his continued involvment in illicit activities.

The foregoing comparison of *Bagley* and *Wilson* to the instant case leads us to conclude that Dobson's amendment applications were sufficient under Florida law. The naked formality of restating information in the amendment that would, in the context of this case, necessarily be identical in every respect to that presented one or two weeks before to the same circuit judge in the original application was not indispensable.

B. The Indictment

Count V of the indictment provided in its entirety:

COUNT FIVE

The Grand Jury further charges that:

> Commencing during January, 1977 and continuing thereafter up to and including the date of the filing of

> this indictment, within the Northern District of Florida, and elsewhere, MANUEL ERIC VILLANUEVA, JOSE LUIS ACOSTA, MANUEL W. JAMES, GUSTAVO J. FERNANDEZ, CLIFFORD B. WENTWORTH, CARLTON C. REEVES, JAMES L. SELLERS, JOHN M. ARANEO, PATRICK C. WALDROP, RUSSELL HOBSON, and RENE BENITEZ, defendants herein, did unlawfully, willfully and knowingly conspire, combine, confederate and agree together, with each other and with divers other persons known and unknown to the Grand Jury, to distribute and to possess with intent to distribute marihuana, a Schedule I controlled substance in violation of Title 21, United States Code, Section 841(a), all in violation of Title 21 United States Code, Section 846.

The appellants' objection is that in the absence of more detailed factual allegations, Count V was constitutionally insufficient in that it failed to put the defendants on notice of the events giving rise to the crime charged. Along similar lines, the appellants complain that they had previously been tried with respect to the incidents forming the basis for the charge, but that the indictment was so unspecific that they were unable to formulate a coherent objection on double jeopardy gounds.

Defendants' contentions need not detain us long. In *United States v. Yonn*, our court conclusively resolved this very issue adversely to appellants:

> To pass constitutional muster, an indictment must be sufficiently specific to inform the defendant of the charge against him and to enable him to plead double jeopardy in any future prosecutions for the same offense. (citation omitted). Those requirements are satisfied by an indictment that tracks the wording of the statute, as long as the language sets forth the essential elements of the crime. (citations omitted). In addition, "an indictment for conspiracy to commit a criminal offense need

not be as specific as a substantive count." (citation omitted).

Against this background, the indictment here meets the test of specificity. Count II recites the essential elements of the offense charged against Sanes-Saavedra—knowingly conspiring to import a schedule I controlled substance into the United States, in violation of 21 U.S.C. §§ 952(a) and 963. It identified his alleged co-conspirators as well as the particular controlled substance. (citation omitted). The indictment also correctly set forth the time span of the conspiracy: from June 1, 1981 until the date of the indictment (November 24, 1981). (citations omitted). It further described the locale of the alleged conspiracy, at least partially, with the allegation that the criminal activity took place "in the Northern District of Florida and elsewhere." Taken as a whole, these allegations adequately set forth the offense charged.

702 F.2d 1341, 1348 (11th Cir.1983).

C. Impaneling of the Jury

1. The peremptory strike procedure

At the pretrial conference, the district court gave counsel for appellants a choice in the exercise of their peremptory challenges. Either they could exercise three challenges apiece without conferring among themselves prior to announcing the strikes each intended to make (for a maximum total of eighteen challenges, or a minimum of three, depending upon the extent to which the strikes overlapped), or they could collectively exercise fifteen strikes after consultation. Appellants chose the latter option and now contend that because the collective decision making process required lawyers-only conferences and decision making outside the earshot of their clients, the appellants were denied their right to be represented by counsel and to be present at a critical stage in the proceedings.

Rules 43 and 44 of the Federal Rules of Criminal Procedure embody a criminal defendant's rights under the sixth amendment to the United States Constitution to be present and to be represented by counsel at every stage of the proceedings against him, including the impaneling of the jury. Fed.R.Crim.P. 43(a), 44(a); *Illinois v. Allen*, 397 U.S. 337, 338, 90 S.Ct. 1057, 1058, 25 L.Ed.2d 353 (1970); *United States v. Chrisco*, 493 F.2d 232 (8th Cir.1974). Those rights necessarily extend to that phase of the jury selection process involving the exercise of peremptory strikes. *Chrisco*, 493 F.2d at 236-37.

Rule 24(b) outlines the appropriate procedures for exercise of peremptory challenges:

> If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. . . If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

Fed.R.Crim.Pro. 24(b). The procedure utilized in the appellants' trial comported with Rule 24: the defendants were permitted jointly to exercise fifteen peremptory strikes—ten as a matter of right under the rule, and an additional five in the discretion of the trial court because there was more than one defendant involved. Appellants do not dispute this, but argue nevertheless that because the lawyers conferred among themselves outside the courtroom before exercising their peremptory strikes, their clients were simultaneously denied access to counsel and their right to be present.

We disagree. Nothing in the record suggests that counsel were rendered unable to confer with their clients in the course of the peremptory strike process. At the pretrial conference, the court told counsel that "I will give you an opportunity to confer among yourselves back in the back outside the hearing of everybody before you have to exercise your peremptory challenges," and at the voir dire, counsel

took advantage of that opportunity. Nothing prevented counsel from speaking with their clients after they had conferred informally among themselves, before they made their strikes. Under these circumstances, we are unable to conclude that the appellants were deprived of their right to counsel. *United States v. Alessandrello*, 637 F.2d 131, 144 (3d Cir.1980); *Chrisco*, 493 F.2d at 237.

We likewise hold that the defendants were not denied their right to be present during the peremptory strike phase of jury selection. This case is quite close on its facts to the Eighth Circuit's decision in *United States v. Chrisco*, 493 F.2d 232 (8th Cir.1974). In *Chrisco*, the defendants were absent from the courtroom when their counsel informally conferred and made their peremptory strikes (a situation somewhat more troubling than in the instant case, where the defendants were in the courtroom at all times, and counsel left briefly to confer). The *Chrisco* court nevertheless held that the defendants had not been denied their right to be present for the peremptory strike phase of the jury selection process, in light of the following facts: the defendants were in the courtroom when the voir dire questioning took place and again when the peremptory strikes were given actual effect by the clerk's reading off the list; the defendants had the opportunity to discuss their misgivings with counsel during or immediately following the impaneling process; and no objection was made at the time to the defendants' absence from the informal peremptory strike conference. For the same reasons, we conclude that the defendants were sufficiently present at the impaneling of the jury to satisfy the sixth amendment and Rule 43 of the Federal Rules of Criminal Procedure.

2. Sufficiency of the voir dire inquiry

The appellants' second attack upon the jury selection procedures employed in this case is directed at what they perceive to be an impermissibly brief and superficial voir dire examination conducted by the trial court. At the pre-trial conference, the district judge informed counsel that he intended to conduct the voir dire himself, that counsel could

submit questions they wanted asked, and that the court in turn would determine which questions were appropriate. (v. 29 at 16-17). Waldrop and Fernandez subsequently submitted lists containing 71 and 58 questions, respectively. (v. 9 at 2109-2112; 2173-2176). At the voir dire, the court posed twelve questions to the jurors, most if not all of which were among those requested by the defendants.[12] The appellants contend that the limited number of questions asked by the court precluded the defendants from rationally exercising their jury strikes, both peremptory and for cause.

Rule 24(a) of the Federal Rules of Criminal Procedure provides that:

> The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or it may itself conduct the examination. In the latter event, the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

In granting the district court latitude to ask or have asked such questions "as it deems proper," Rule 24 vests considerable discretion in the court to determine the appropriate method and scope of voir dire. *United States v. Brunty*, 701 F.2d 1375, 1378 (11th Cir.1983). That discretion, however, is not boundless:

> We do not deem "as it deems proper" to give a trial judge unlimited discretion to ignore proposed questions nor to permit arbitrary refusal to put such questions.
>
> We do not consider the court's obligation to let counsel, on request, get at underlying bases reflecting on bias,

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[12] It should be added that a number of the proposed questions seeking general background information respecting the individual jurors were answered by means of questionnaires filled out and returned by the venire.

> prejudice or other suspect factors to be discharged by general questions such as, "Is there any reason you cannot fairly and impartially try this case?" This obligation particularly would not seem to be discharged by general direct confrontation questions on human characteristics that most people are reluctant to admit they possess.
>
> On the other hand, we do not mean to suggest that the same matter may be explored in numerous substantially similar questions, with tedious repetitions, of only slightly variant shadings of meaning. No hard and fast rules can be laid down, but the trial court within the general guidelines hereinbefore set forth must exercise its discretion so as not to block the reasonable exploration of germane factors that might expose a basis for challenge, whether for cause or peremptory.

United States v. Lewin, 467 F.2d 1132, 1138 (7th Cir.1972); *see also United States v. Nell*, 526 F.2d 1223, 1229-30 (5th Cir. 1976). *Accord United States v. Ledee*, 549 F.2d 990, 993 (5th Cir. 1977) ("Peremptory strikes are worthless if counsel is not afforded an opportunity to gain the necessary information upon which to base such strikes").

The appellants charge that the defendants were rendered unable to exercise rationally their jury strikes, because of the trial court's failure to pursue two crucial avenues of inquiry: juror bias toward marijuana, and juror prejudgment due to the enormous quantity of marijuana involved in this case. Contrary to the appellants' suggestion, the district court did inquire into juror bias toward marijuana, as follows:

> THE COURT: All right. Now, as I have previously indicated to you, this case involves the alleged importation of marijuana. Marijuana and drug laws in this day and age are somewhat of a controversy. There are those individuals who think that the drug laws are too strictly enforced. There are also those individuals that think the drug laws are not strictly enough enforced.

> Now, without asking whether you have any opinions concerning the drug laws, are there any of you that feel that, whatever your opinions may be, that it would influence your conduct in acting as a fair and impartial jury just because this is a drug case? Does everybody understand what I mean?
>
> Are there any of you that feel so strongly about the drug laws that you do not feel that you could base your verdict solely on the evidence, the argument of counsel, and the charge that I will give at the conclusion as to the law that you must follow?

(v. 30 at 54-55).

In response to that question, one juror indicated that he "was going to try" to base his verdict solely on the evidence, but that it would be "a hard decision," because he dislikes drugs "mighty hard." (v. 30 at 55-56). While no challenge for cause followed, the juror was subsequently removed by means of a peremptory strike. (v. 30 at 68). We are satisfied that the trial court's inquiry into the juror's bias toward marijuana offenses was sufficient to create "a reasonable assurance that prejudice would be discovered if present." *United States v. Nell*, 526 F.2d 1223, 1229 (5th Cir.1976).

Appellants further challenge the sufficiency of the voir dire because of the trial court's failure to inquire into potential juror prejudice against the defendants in light of the large quantity of marijuana involved. As noted earlier, during the pretrial conference the defendants were invited to submit questions for the court to ask prospective jurors; a total of 129 questions were later submitted. Not one of those proposed questions asked whether the jurors would be affected by the quantity of drugs involved in the case. We are satisfied that the general inquiry into the jurors' opinions respecting drug offenses was sufficient to disclose relevant prejudices, and that it was well within the trial court's discretion not to pursue the matter further with additional questions concerning the jurors' attitudes toward the quantity of marijuana at issue—especially in light of the fact

that the defendants never requested that such a question be posed. *United States v. Eastwood*, 489 F.2d 818, 819-20 (5th Cir. 1973) (general questions posed by the district court pertaining to juror bias sufficed for specific questions proposed by defendant but rejected by the court); *United States v. Desmarais*, 531 F.2d 632, 634 n. 4 (1st Cir.1976) (failure of defendant to request that specific questions be asked was relevant to a determination that the trial court did not abuse its discretion in failing to ask such questions).

3. The voir dire and defendants' presumption of innocence

As a final attack on the impaneling process, appellants challenge the trial court's inquiries and admonitions concerning the purpose and effect of a grand jury indictment, as impermissibly stripping the defendants of their presumption of innocence, by suggesting that the indictment constituted a probable cause determination of guilt. Contrary to the appellants' claims, when the two questions and comments complained of are placed in context, the trial court's discourse with veniremembers served to protect rather than to threaten the defendants' presumption of innocence.

In both instances, the remarks at issue were preceded by a question from the court inquiring into whether any of the veniremembers had previously served on a jury. Answers were given indicating that certain individuals had served on grand juries, which prompted the court to respond with a follow-up question:

> Has anybody else had any either grand jury or petty jury experience?
>
> All right. Which leads me to the statement that I make now. Do any of you realize that, of course, the indictment in this case is not evidence of guilt and it only represents a finding that there is probable cause to believe that an offense has been committed by someone(?) Do each of you understand that?
>
> All right. Do each of you understand that in our system the accused stands now before you innocent and

remains so until proven guilty beyond a reasonable doubt? Do each of you understand that?

All right. Do each of you understand that the accused need not offer any evidence, need not testify, need not say a thing and that it is on the government to prove their guilt beyond a reasonable doubt? Do each of you understand that? Do each of you agree with that principal (sic)?

(v. 30 at 52-53). And again:

THE COURT: You were on a grand jury then. Do each of you understand the difference between a grand jury and a petit jury? Do each of you understand that a grand jury makes a finding of probable cause whereas a petit jury must be convinced by the evidence beyond a reasonable doubt before a conviction can be held(?)

(v. 30 at 70-71). Having evaluated the court's remarks in the context in which they arose, it is clear that the defendants' presumption of innocence and the government's burden of proof were left fully intact. *See United States v. Faulkner*, 488 F.2d 328, 330-31 (5th Cir. 1974).

III. Issues Relating to Matters Arising at Trial

A. Closing Argument

The appellants challenge the italicized portions of the following excerpt from the government's closing argument, as improperly calculated to incite the passions of the jury and prejudicial to the defendants' right to a fair trial:

By your verdict today, by your verdict today or tomorrow, whenever you render that verdict, you will be serving the cause of justice. I am going to tell you, too, whatever the outcome is in this case, justice will have been served. I want to see justice done. I don't want to see convictions for the sake of convictions. I want to see that justice is done.

You go in there, follow the instructions of the law, apply it to the evidence in the case. Then justice will have been done. Justice will have been served.

But you serve by your verdict, you serve as a conscience of this community. If you find that the government, by its evidence, has proved these defendants guilty beyond and to the exclusion of a reasonable doubt, then it's your duty to find these defendants guilty as charged. By that verdict, you will send out a very loud and clear message to other people of a similar persuasion that will traffic—

MR. HARTMAN: Judge, I object.

THE COURT: Overruled.

MR. GEEKER: *—That would traffic in marijuana of these quantities,* that would engage in this kind of illegal activities. *You have heard and you're familiar by virtue of your own common sense and experience with everyday affairs, the term, the war on drugs.*

Isn't this case really one about a war? Haven't they invaded our shores?

MR. HARTMAN: Objection.

MR. KRIEGER: Objection.

THE COURT: Well, the argument of counsel is in response to the defense lawyer's argument. The jury knows that the argument of counsel is not evidence. To that extent, they will disregard it.

MR. GEEKER: In any event, *there are tons and tons of marijuana broug[illegible] into our communities here and dumped on our community.* This arena of justice, this court of law, is the place to decide whether or not this kind of activity is going to continue. Consider the evidence.

MR. DIAMOND: Continuing objection—

THE COURT: Overruled.

MR. DIAMOND: Continuing objection to that line of questioning.

THE COURT: Overruled.

MR. GEEKER: Consider your verdict based on the evidence, not what I argue. My argument is not evidence. But consider the evidence. If you consider the evidence and weigh it properly, then I am confident you will return a just verdict. Thank you.

(v. 43 at 293-95).

In order for a claim of prosecutorial misconduct during closing argument to warrant reversal, the challenged remarks must be 1) improper; and 2) prejudicial to a substantial right of the defendant. *United States v. Kopituk*, 690 F.2d 1289, 1341 (11th Cir.1982). Upon evaluating the prosecutor's closing argument in light of the foregoing criteria, we hold that the challenged statements do not constitute reversible misconduct.

The statements of the United States Attorney that are complained of in this appeal, were made in rebuttal, following the closing arguments of the defendants. Among the closing arguments, and occupying thirty pages of transcript, was a self-described "drama" performed by counsel for James and beginning as follows:

> This is a criminal trial. This is a big case for the government. That's what it was, folks. I didn't lie. It was a circus right from the beginning to the bitter end.
>
> So allow me to indulge a bit in a little drama and tell you about Operation Sunburn.
>
> Ladies and gentlemen, welcome to the Big Top, the Greatest Show on Earth, also known as Operation Sunburn. Accompany me. The drama is in three sections. Starring Mr. Nickolas Geeker, United States Attorney, as Mr. Nick the Ringmaster. Mike Moore as Mr. Mike, the Animal Trainer, and Assistant Ringmaster, Mr.

> Ken Sukhia, as the Young Circus Boy in Training. The Friendly Mr. Ferdinand Bockelman, the Paper Man Putting Posters Out to Welcome People to the Circus. And Scott Daniels, Assistant Animal Trainer and Keeper of the Zoo.
>
> Act One. The circus comes to town. Well, Mr. Nick, we certainly have a good circus coming here. We've got a good show, got a lots of animals lined up for Mr. Mike. I got some great people some—rather, we've got them lined up. We are going to get that man on the high wire.
>
> Who is that, says the Young Circus Boy. Who is that man walking on the high wire up there?
>
> Well, this is Manny James.

Defense counsel's extended analogy of the government's conduct to a three-ring circus "was clearly an invitation to the prosecutor to protest to the contrary," *United States v. Eley*, 723 F.2d 1522, 1526 (11th Cir.1984). When the prosecutor goes no further than to take defense counsel up on his invitation, his conduct will not be regarded as impermissibly calculated to incite the passions of the jury. *Id.; see also United States v. Cotton*, 631 F.2d 63, 63-66 (5th Cir.1980). The United States Attorney's likening the drug problem to a war or enemy invasion, coupled with his statement that he was interested in justice and not convictions for their own sake, could fairly be described as little more than a response to defense counsel's suggestion that the defendants' prosecution was a show put on by government counsel for their own amusement.

Turning to the specific remarks complained of, prosecutorial appeals for the jury to act as "the conscience of the community" are not impermissible, unless calculated to inflame. *United States v. Kopituk*, 690 F.2d 1289, 1292-93; *United States v. Lewis*, 547 F.2d 1030, 1036 (8th Cir.1976); *United States v. Alloway*, 397 F.2d 105, 113 (6th Cir.1968). Nor is it impermissible "to simply compare the duties of citizens

serving on juries with those of citizens serving in the armed forces." *Brooks v. Francis*, 716 F.2d 780, 789 (11th Cir. 1983) (en banc pending). Finally, the prosecutor's reference to "tons and tons" of marijuana being "dumped" on the community was nothing more than a permissibly colorful way to describe a fact amply borne out in the record.

Because the remarks of government counsel are better understood as a response to the defendant's closing argument than as an attempt to inflame the jury, and because those remarks were not improper in and of themselves, reversal is unwarranted.

B. Ex Parte Communications Between the Judge and Jury During Deliberations

The jury commenced its deliberations at 9:50 a.m. on March 25. In the course of the day, the judge and jury exchanged several notes: (1) the jury requested an index of tapes played at trial, to which the court responded that no acceptable index existed; (2) the jury inquired as to a number of pages missing from the indictment, to which the court responded that the missing pages involved matters not relevant for the jury's consideration; (3) the jury requested transcripts of telephone conversations introduced into evidence by the prosecution and defense, to which the court responded that the jury already had transcripts of all telephone conversations introduced by the government, that some but not all of the telephone conversations introduced by the defense had been transcribed, and that to the extent the jury could not recall what it heard in the tapes that were not transcribed, it could request that any particular tape be replayed in open court; (4) the jury indicated that the tape transcripts were not in the jury room, to which the court did not respond. (v. 15 at 3455-62). The court went back on the record at 6:00 p.m., and in the presence of counsel stated:

> I think we'll start tomorrow morning afresh, assuming they're not finished. I am confident they're not. But what I thought I would do is just send a note to them

> and ask them if they have arrived at any complete verdicts as to any defendants. Then find out yes or no. And then tell the marshal to bring them into the courtroom and bring with them only those verdicts, if any that they have arrived at as to any of the defendants. Is that fair enough?

(v. 44 at 68). Notwithstanding the concern of a number of defendants that such a note might be interpreted as coercive, the court sent the following message to the jury room: "Have you arrived at a unanimous verdict as to any defendant which you wish to report to me? Yes or no," to which the jury responded, "No, sir." The record reflects that the jury was returned to the courtroom at 6:11 p.m., at which time the court stated:

> Members of the jury, I passed the note to you asking you whether you had reached a unanimous verdict as to any defendant, for the sole purpose of trying to give me some idea of how you were coming in your deliberations. I don't suggest that you should have reached a unanimous verdict as to any defendant. It occurs to me you have been here now over ten hours and you have had to digest a lot of things. And it further occurs to me that you probably won't be able to reach a verdict tonight as to any or all of the defendants. And consequently, I am going to discharge you to the custody of the marshals for the remainder of the evening.

(v. 44 at 71-72).

After the jury had been excused, the court stated as follows:

> While we are on the record and the jury is gone, have all counsel seen the notes that the jury has, the questions they have asked and the answers given?...I didn't see any need in calling counsel on the questions that were asked. The main problem was, they couldn't find a piece—or some evidence. And the transcripts of the tapes.

(v. 44 at 72-73). Counsel for appellant James indicated affirmatively on the record that he had read the notes, and it can be assumed by the silence of the remaining counsel, who were present, that they had likewise read the notes. No objections were made at that time.

On March 26, two notes were sent from the jury to the court: one indicating that a verdict had been reached as to four of the six defendants, and the second stating that the jury was hung with respect to one defendant. At 4:45 that afternoon, the court went on the record to say that it had received the note indicating that the jury was hung, and proposed that an *Allen* charge, the so-called "dynamite charge," be given. Over objection, the jury was returned to the courtroom at 4:51, and the *Allen* charge was read. The verdict was returned approximately an hour after the jury had been returned to the jury room and recommenced deliberations.

With respect to the court's inquiry into whether the jury had reached a partial verdict as of the evening of the 25th, we find that no error was committed. The record clearly indicates that the communication was not undertaken until after counsel had been notified and had been given the opportunity to object. *United States v. McDuffie*, 542 F.2d 236, 241 (5th Cir.1976). Moreover, any coercive or otherwise improper impact the note might conceivably have had, was neutralized by the court's later remarks when the jury was returned to the courtroom.

The other communications undertaken on the 25th are somewhat more troubling. It is certainly true that preferable procedure would have been for the court to have informed counsel of communications from the jury and to afford them an opportunity to be heard before written responses were returned. *United States v. McDuffie*, 542 F.2d 236, 241 (5th Cir.1976). Nevertheless, counsel's failure to object to the ex parte communications at the time they were revealed may have operated as a waiver. Moreover, courts have universally held that where wholly innocuous inquires of the sort

at issue here are responded to by the court without first consulting counsel, any error thereby committed is non-prejudicial. *United States v. Reynolds*, 489 F.2d 4, 7-8 (6th Cir. 1973); *United States v. Stone*, 452 F.2d 42, 48-49 (8th Cir.1971); *United States v. Goodman*, 457 F.2d 68, 72-73 (9th Cir.1972); *United States v. Freed*, 460 F.2d 75, 78-79 (10th Cir.1972). As the Fifth Circuit noted in *United States v. Breedlove*, 576 F.2d 57, 60 (5th Cir.1978), "when the judge's answer to the jury's inquiry was distinctly responsive to the question, it clearly stated the law, and no prejudice is shown, the error is harmless." *See also United States v. McDuffie*, 542 F.2d 236, 241 (5th Cir.1976). In this case, the court's answers were distinctly responsive to the jury's questions, and as such were at most harmless error.[13]

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[13] Counsel for Villanueva and Fernandez make reference to a note submitted by the jury to the court on the 26th stating: "We would like to go home and come back tomorrow." (v. 15 at 3467). In their brief, Villanueva and Fernandez assert that this note was submitted to the court without the knowledge of defense counsel before the *Allen* charge had been given and before a verdict had been reached. They argue that the effect of the *Allen* charge urging the jury to attempt to resolve their differences and reach a verdict, when the jury had expressed a desire to go home, was impermissibly coercive, but that because counsel were unaware of the jury communication, no objection was possible.

This argument is premised upon a blatant misreading of the record. The jury returned its verdict at 6:10 p.m. on March 26. (v. 44 at 80-88). At that point, the court informed the jury that it still had to decide whether certain pieces of defendants' property were to be forfeited to the government. On the record and in open court, the judge gave the jury the option of continuing on into the evening or returning in the morning, and the jury responded by way of a note, that again was read in open court and on the record, saying that they would prefer to recess and return in the morning. (v. 44 at 88-89). Since the communication appellants complain of occurred with their knowledge, after the *Allen* charge had been read and the verdicts announced, and without objection, the appellants' argument is patently frivolous.

Separate Issues

I. Villanueva and Fernandez

A. The interview of Fernandez by a United States Attorney outside the presence of Fernandez's counsel.

Prior to trial, with the knowledge and assent of Fernandez's attorney, a United States Attorney offered not to oppose Fernandez's motion to reduce bond, in return for the opportunity to speak with Fernandez privately, outside the presence of his counsel. Fernandez agreed. The government's objective was to investigate what was suspected to be the improper representation of Fernandez and James by their principal attorney, a suspicion subsequently confirmed, resulting in disqualification of the lawyer involved.

On the basis of this incident, Fernandez moved the district court to dismiss the indictment. The district court ruled that the communication was improper, but could be remedied by means less extreme than dismissal:

> Assuming the United States Attorney's behavior amounted to misconduct, the "remedies should be tailored to the injury suffered. . . ." *United States v. Morrison*, [449 U.S. 361, 364, 101 S.Ct. 665, 668], 66 L.Ed.2d 564, 568 (1981). . . . Fernandez complain(s) of two injuries. One is that the United States Attorney's actions poisoned their relationship with their lawyer. That complaint is mooted by their lawyer's disqualification. The other is that through his conversations with them the United States Attorney gained evidence and leads to even more evidence. The United States Attorney quite properly states he does not intend to introduce in his case in chief any evidence given him in the meetings and that the conversations were not used to obtain evidence. Even if, as defendants allege, evidence were procured through the conversations, the prejudice can be cured by suppression of the evidence.

On appeal, Fernandez acknowledges that the Supreme Court's unanimous decision in *United States v. Morrison* explicitly held that absent demonstrable prejudice, dismissal of an indictment for violation of a defendant's sixth amendment rights is unnecessary. 101 S.Ct. 665, 449 U.S. 361, 66 L.Ed.2d 564 (1981). Inexplicably, however, Fernandez does not challenge the district court's conclusion that the potential for prejudice could be eliminated by means stopping short of dismissal, but instead is content to argue that the government's conduct requires per se dismissal. In effect, the appellant invites us to overrule Supreme Court precedent. We decline.

The agreement negotiated by the United States Attorney, wherein Fernandez was to barter his right to counsel in return for his freedom, constituted a coerced rather than voluntary waiver of the appellant's sixth amendment rights, and as such was wholly improper. *See Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977). Nevertheless, we are in complete agreement with the district court that suppression of information obtained from Fernandez in defense counsel's absence assured that the government's misconduct would not prejudice the appellant in any way. Fernandez is unable to point to any evidence admitted at trial that was secured as a result of the improper interview. Accordingly, we affirm its ruling.

B. The sufficiency of the evidence supporting Villanueva's continuing criminal enterprise conviction.

Under 21 U.S.C. § 848, a person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment of ten years to life. A person is considered to have engaged in a continuing criminal enterprise if he violates any provision of 21 U.S.C. §§ 801 *et seq.* governing drug abuse prevention and control, in the course of a continuing series of like violations undertaken in concert with five or more other persons "with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management," as a result of which that

person obtains substantial income or resources. Villanueva challenges his conviction under this statute, on the grounds that the evidence was insufficient to demonstrate that he was an organizer or supervisor of the enterprise. Viewing the record in the light most favorable to the government, we conclude that the evidence was sufficient to support Villanueva's conviction.

Evidence supporting Villanueva's continuing criminal enterprise conviction came largely from the testimony of two of Villanueva's former co-conspirators: Bill Cobb and Dan Abbey. Cobb testified that from the time of his first involvement in the conspiracy, Acosta, Bascaro, and Villaneuva were the ones principally responsible for bringing marijuana into the United States. Cobb testified that Villaneuva was involved in overseeing the purchase of suitable vessels, was present at storage sites when marijuana arrived, and participated in planning meetings. Cobb further testified that Villanueva furnished the money to purchase the properties where marijuana was stashed (v. 38 at 152-63); Villanueva together with Acosta were responsible for approving the sites where marijuana was to be offloaded (v. 38 at 183); and the enterprise deferred to Villanueva's judgment as to when the offloading was to occur (v. 38 at 195).

Abbey testified that the standard operating procedure of the enterprise was for him to collect the proceeds from various drug sales and turn them over to Villanueva and Acosta. (v. 40 at 15-17; 48-49; 57). Abbey further indicated that Villanueva was one of several members of the organization who would prepare the weight sheets, records reflecting the quantity of marijuana transferred to particular buyers. Weight sheets were reproduced in triplicate, and upon completion of a sale, one copy would go to the buyer, another would be retained by Abbey, and a third would be returned to either Acosta or Villanueva. (v. 40 at 42-44). At the conclusion of his direct examination, Abbey was asked to describe the various roles of the individuals about whom he had testified. He responded, without objection from defense

counsel, that Villanueva "was in charge of the complete operation initially." (v. 40 at 65-66).

The foregoing testimony furnishes an adequate basis for the conclusion that Villanueva occupied a supervisory role in the conspiracy. Certainly the most conclusive evidence of this fact is Abbey's testimony that Villanueva was "in charge of the complete operation," and again that he was "the top man." (v. 40 at 65-94). Such conclusions were amply supported by Abbey's previous testimony concerning Villanueva's financial control of the enterprise. *United States v. Johnson*, 575 F.2d 1347 (5th Cir. 1978).

C. Double jeopardy and Villanueva's convictions for both continuing criminal enterprise and underlying conspiracy counts.

In affirming Villanueva's continuing criminal enterprise conviction, we must simultaneously vacate his convictions on counts three and five for conspiracy to import and conspiracy to possess with intent to distribute marijuana, on double jeopardy grounds. The conspiracy provisions of the Controlled Substances and Controlled Substances Import and Export Acts proscribe conspiracy to commit any of the offenses defined in those acts. 21 U.S.C. §§ 846; 963. Similarly, the crime of continuing criminal enterprise, as defined in the Controlled Substances Act and construed by the Supreme Court in *Jeffers v. United States*, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977), includes as one of its elements a conspiracy to violate the provisions of the Controlled Substances or Controlled Substances Import and Export Acts. 21 U.S.C. § 848(b). In other words, one cannot be guilty of continuing criminal enterprise without also being guilty of conspiracy—the latter is a lesser included offense of the former. *Jeffers*; *United States v. Michel*, 588 F.2d 986, 1001 (5th Cir. 1979); *United States v. Graziano*, 710 F.2d 691, 699 (11th Cir. 1983). Where, as here, a defendant is convicted of engaging in a continuing criminal enterprise as well as the lesser included offenses of conspiracy to import and conspiracy to possess with intent to distribute marijuana, the

proper remedy is to vacate both the convictions and sentences of the lesser included conspiracy offenses. *Graziano*, 710 F.2d at 699.

II. Hobson and Waldrop

Appellants Hobson and Waldrop argue that the evidence was insufficient to sustain any of their several convictions. Both Hobson and Waldrop were convicted of conspiracy and substantive offenses under the RICO statute, conspiracy to import and conspiracy to possess with intent to distribute a controlled substance, and possessing with intent to distribute and importing a controlled substance.

Hobson and Waldrop might best be described as preferred customers of the enterprise. They were marijuana buyers (v. 40 at 66), Waldrop was described as one of the organization's "best buyers" (v. 40 at 55), and it was estimated that the two of them had purchased marijuana from the organization on 25 or 30 occasions (v. 40 at 62). The closeness of the working relationship between Hobson, Waldrop, and the other members of the enterprise is evidenced by numerous instances of mutual accommodation. Waldrop was relieved of his obligation to pay for 750 pounds of marijuana that Waldrop claimed was bad (v. 40 at 25), Waldrop and Hobson advanced money to the other members of the enterprise as a deposit on an incoming marijuana shipment (v. 38 at 187, 220-22), and at Hobson's instigation, a second attempt was made to import marijuana by plane following the failure of an initial attempt (v. 38 at 222-23).

Hobson and Waldrop's convictions arose out of their involvement in two smuggling ventures: the "Tallahassee warehouse" and "Constellation" episodes. The Tallahassee warehouse episode involved Waldrop but not Hobson. In April 1978, a warehouse in Tallahassee, Florida was leased in anticipation of the arrival of a double load, or 80,000 pounds, of marijuana. The load arrived in late April, of which 40,000 pounds was set aside for Waldrop; for reasons that were never explained, however, Waldrop was late in

picking the load up. (v. 40 at 52-53). On April 26, the Florida Department of Law Enforcement discovered the stash, and were at the warehouse conducting an investigation when Waldrop arrived in a rented car. (v. 31 at 85-90). Waldrop was stopped and questioned, and a consensual search of his briefcase yielded records of marijuana transactions. The records were seized, but Waldrop was released at that time. (v. 31 at 89-90).

The Constellation episode involved both Hobson and Waldrop. In January 1979, Cobb, together with Waldrop and Hobson, made arrangements for the delivery of a planeload of marijuana. (v. 38 at 186-87). Appellant James advised Cobb against embarking upon this particular venture, but agreed to stand by and provide Cobb with legal assistance if necessary. (v. 38 at 187-88). Waldrop made a down payment of $1,500,000 with the expectation that he and Hobson would receive the entire planeload of marijuana. (v. 34 at 165; v. 38 at 167; v. 40 at 55). The plan failed, however, when the plane was seized upon its arrival at the Ft. Lauderdale airport. Appellant James was called in to represent the parties arrested (v. 38 at 188), and Acosta interposed himself between Cobb and the Colombian sellers, who were blaming Cobb for the venture's failure (v. 39 at 118-19).

Waldrop and Hobson requested that Cobb either attempt a second airplane smuggling venture, or return their security deposit; Cobb agreed to a second attempt on the condition that Waldrop and Hobson purchase most if not all of the shipment. (v. 38 at 221-23). In February 1979, a Constellation aircraft was flown to Colombia, and loaded with marijuana. Because of fog and engine problems, the craft was compelled to land in Panama City in lieu of the more clandestine site agreed upon, and federal agents were ready and waiting upon its arrival. (v. 32 at 132-40; 161-66).

A. Conspiracy to Import and Conspiracy to Possess with Intent to Distribute

Hobson and Waldrop insist that the record is devoid of evidence that they entered into a conspiratorial agreement with the other co-defendants; at best, they contend, the evidence indicates that they were merely buyers from and not members of the conspiracy.

In order for a defendant to be found guilty of conspiracy, the government must demonstrate that a conspiracy existed, that the defendant had knowledge of it, and that he or she voluntarily became a part of it. *United States v. Badolato*, 701 F.2d 915, 920 (11th Cir.1983); *United States v. Lippner*, 676 F.2d 456, 466 (11th Cir.1982). The existence of a conspiracy may be demonstrated by circumstantial evidence such as inferences from the conduct of the defendant or circumstances indicating a scheme or plan. The knowledge requirement refers simply to knowledge of the essential objective of the conspiracy; a defendant may be found guilty notwithstanding that he did not have knowledge of all the details of the conspiracy or played only a minor role in the total operation. *Badolato*, 701 F.2d at 918-20; *United States v. Corbin*, 734 F.2d 643 (11th Cir.1984).

It is settled that the existence of a simple buyer-seller relationship alone does not furnish the requisite evidence of a conspiratorial agreement. *United States v. Braico*, 422 F.2d 543 (7th Cir.1970); *United States v. Watson*, 594 F.2d 1330, 1337 (10th Cir.1979); *United States v. Torres*, 503 F.2d 1120, 1123 (2d Cir.1974). It is equally will settled, however, that where a buyer knowingly assumes a role instrumental to the success of the conspiracy, the jury may properly infer that he is a member in it. *United States v. Apollo*, 476 F.2d 156, 162 (5th Cir.1973) (finding it unnecessary "to define precisely how limited purchases, in number or size, may be in such 'mere purchases' cases and still permit the intent to participate in an unlawful conspiracy to be inferred," because "in the present case, there was direct proof of a continuing relationship between Apollo and Cocroft, a known conspirator,

which resulted on at least two occasions in the witting transfer of company marijuana to Apollo"); *United States v. Hess*, 691 F.2d 984, 988 (11th Cir. 1982) (while a fence does not automatically become a conspirator by purchasing stolen property, fences are necessary to the success of a hijacking conspiracy, and a fence who holds himself out as a place to dispose of stolen goods is a conspirator).

In this case, it is clear that Hobson and Waldrop were more than "mere purchasers." They were among the selling group's best buyers, they purchased from the selling group on numerous occasions, and maintained a close relationship with the selling group. The success of the selling group's endeavors depended upon the participation and cooperation of Hobson and Waldrop: Waldrop's failure to pick up the marijuana from the Tallahassee warehouse as scheduled resulted in a delay that led to seizure of the shipment, and the success of the Constellation episode depended upon Hobson's and Waldrop's willingness to purchase a majority if not all of the marijuana load. Accordingly, we find the evidence more than sufficient to sustain the conclusion that Hobson and Waldrop had entered into a conspiratorial agreement with the other co-defendants.

Hobson and Waldrop further argue that regardless of whether their role as frequent buyers is sufficient to demonstrate their complicity in a conspiracy to possess marijuana, the evidence remained insufficient to support the inference that they had knowledge that the marijuana was imported. Accordingly, they contend that their convictions for conspiracy to import cannot stand, because they had no knowledge of an essential objective of the conspiracy.

In order to be guilty of conspiring to import a controlled substance, in violation of 21 U.S.C. § 963, the defendant must have known that the substance was imported. *United States v. Steward*, 451 F.2d 1203 (2d Cir.1971); *Mason v. United States*, 383 F.2d 107 (10th Cir.1967). A defendant will not be held to have knowledge of an illegal importation solely on the basis of evidence that one or more of his alleged co-conspirators

had such knowledge; nevertheless, direct or circumstantial evidence may justify an inference of knowledge. *Mason v. United States*, 383 F.2d 107 (10th Cir.1967).

Here, there is no question that marijuana was imported from Colombia, South America into the United States by means of boat and airplane. There is likewise no question that Hobson and Waldrop's co-defendants were aware that the marijuana was imported. In light of the massive quantity of marijuana involved, the frequency with which Waldrop and Hobson had occasion to deal with the other members of the enterprise, the fact that Hobson, Waldrop and Cobb were described as the principal organizers of the Constellation episode in which marijuana was to be delivered by airplane from Colombia to southern Florida, and the presence of both Hobson and Waldrop at various of the organization's stash houses on numerous occasions, the jury was warranted in finding that Hobson and Waldrop knew the marijuana was imported. *United States v. Corbin*, 734 F.2d 643 (11th Cir.1984); *United States v. Garcia*, 721 F.2d 721, 725 (11th Cir.1983).

B. The RICO Offenses

Subsection (c) of 18 U.S.C. § 1962 makes it unlawful to conduct or participate, directly or indirectly, in the conduct of an enterprise's affairs through a pattern of racketeering activity. Subsection (d), in turn, makes it unlawful to conspire to violate the provisions of subsection (c).

Hobson was convicted of a substantive RICO violation pursuant to subsection (c), as well as a RICO conspiracy under subsection (d). The basis for Hobson's RICO convictions arose from his involvment in the Constellation episode in connection with which he was indicted and convicted of importation and possession with intent to distribute marijuana.[14] Hobson argues that these two convictions were

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[14] It may be recalled that Hobson was also convicted of conspiracy to possess and conspiracy to import, which would qualify as additional acts of racketeering under the Act; the indictment,

(footnote continued on next page)

the result of a single attempt on his part to procure marijuana, and that consequently he was not shown to have engaged or conspired to engage in a "pattern" of racketeering activity.

"Pattern of racketeering activity" is defined in 18 U.S.C. § 1961(5) as "at least two acts of racketeering activity" committed within a ten-year period. "Racketeering activity" is defined to include "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or *dealing in narcotic or other dangerous drugs*, which is chargeable under state law and punishable by imprisonment for more than one year." 18 U.S.C. § 1961(1) (emphasis supplied). The statutory definition of pattern of racketeering activity has been construed as follows:

> To be convicted of a § 1962(c) RICO charge, the evidence must show that the defendant participated in the affairs of the enterprise through a pattern of racketeering activity. This requires the commission of at least *two predicate crimes.*

United States v. Welch, 656 F.2d 1039, 1057 (5th Cir. 1981) (emphasis supplied). Possessing and importing marijuana are two separate crimes and consequently two separate acts for purposes of the RICO statute. The appellants' suggestion that two predicate acts cannot have arisen out of a single transaction was expressly considered and rejected in *United States v. Phillips*, 664 F.2d 971, 1039 (5th Cir. Unit B 1981).

Waldrop's convictions under the RICO statute stem from his involvement in both the Tallahassee warehouse and Constellation episodes. The predicate acts of racketeering activity underlying the RICO counts included: possession of marijuana with intent to distribute, in connection with the

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(footnote continued from preceding page)

however, limited the predicate acts alleged against Hobson under the RICO charges to the two substantive offenses.

Tallahassee warehouse venture; and importation and possession of marijuana with intent to distribute in connection with the Constellation venture.[15]

It is Waldrop's position that the Constellation venture was independently undertaken by Cobb, Hobson and Waldrop and was not an affair of the enterprise. If the predicate acts alleged in connection with Constellation venture are stripped from indictment on the ground that they were unrelated to the enterprise's affairs, only one predicate act remains—the possession of marijuana stored at the Tallahassee warehouse —which alone does not constitute a "pattern" of racketeering activity. In support of his position, Waldrop makes two related arguments. First, Waldrop assigns error to the district court's refusal to read Waldrop's requested instructions concerning the definition of the enterprise, and Waldrop's theory of defense. Second, Waldrop argues that the evidence does not support the conclusion that the Constellation venture was an affair of the enterprise.

At trial, Waldrop requested that the following instruction be read respecting the definition of the RICO enterprise in this case:

> In order to find defendant, Patrick M. Waldrop, guilty of Count 2, you must find that the government has proven, beyond a reasonable doubt that, the enterprise established by Manuel Eric Villanueva, Jose Luis Acosta and Antonio E. Bascaro, as previously described, existed in fact, and that Mr. Waldrop knowingly and willfully participated in the conduct of this particular enterprise's affairs through a pattern of racketeering activity. In order to conclude that Mr. Waldrop participated through a pattern of racketeering activity, you

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[15] Like Hobson, Waldrop was also convicted on conspiracy charges, but again the indictment did not list those charges as predicate acts in the RICO count.

> must find that he committed at least two of the following acts and that they were in furtherance of the conduct of this particular conspiracy: (the three previously mentioned affirmative acts are then recited).

The district court rejected Waldrop's proposed instruction in favor of the following:

> Count 2 of the indictment alleges that from on or about January 1977 and continuously afterwards up to and including September 3, 1981, defendants Manuel Eric Villanueva, Antonio E. Bascaro, Manuel W. James, Gustavo J. Fernandez, Patrick C. Waldrop, and Russell Hobson were persons associated with an enterprise or an enterprise as defined by Title 18, United States Code, § 1961(4), that the enterprise engaged in or its activities affected interstate commerce and that the defendants knowingly and willfully participated in the enterprise's affairs through a pattern of racketeering endeavor in violation of Title 18, United States Code, § 1962(c). . . . Count 2 alleges that the enterprise consisted of a group of individuals associated in fact for the purpose of importing multi-ton quantities of marijuana into the United States from a place outside of the United States, possessing multi-ton quantities of marijuana with the intent to distribute and distributing within the United States, multi-ton quantities of marijuana, a Schedule I controlled substance. Now let me define some of the terms of this statute for you. The term enterprise, as used in the statute, includes any individual, partnership, corporation, association, or other legal entity and any group of individuals associated in fact, although not a legal entity. . . . In order to establish that any of the defendants named in Count 2 of the indictment committed the offense charged in that count, the government must prove as to that particular defendant each of the following elements beyond a reasonable doubt. First, that the defendant was associated with an enterprise as I have defined it for you. Second, that the

> defendant engaged in a pattern of racketeering activity as I have defined it for you by knowingly and willfully committing, or knowingly and willfully aiding and abetting at least two acts of racketeering activity as hereinafter explained. That at least two acts of racketeering activity occurred within ten years of each other, that one of such offenses took place after October the 10th, 1970, *that the offenses were connected with each other by some common scheme, plan or motive so as to constitute a pattern, and not merely a series of disconnected acts.* Fourth, that the commission of two or more connected offenses the defendants conducted or participated in the conduct of the enterprise. Fifth, that the enterprise engaged in or that its activities affected interstate or foreign commerce.

Waldrop argues that in defining the enterprise as a group associated in fact for the purpose of importing and possessing marijuana, the instruction delivered would lead the jury to find that any marijuana smuggling venture undertaken by one or more of the defendants would necessarily be a venture of the enterprise. Put another way, Waldrop contends that the enterprise was defined for the jury solely in terms of the racketeering activity it allegedly conducted, so that any conduct qualifying as an act of racketeering under the Act would be ascribed to the enterprise, regardless of whether independently undertaken, as Waldrop contends was the case with the Constellation venture. In Waldrop's view, the instruction he proposed avoided this pitfall by more precisely defining the charged enterprise in terms of its principal organizers.

Waldrop is quite correct that the existence of an enterprise is an element of a RICO violation distinct from the element of a pattern of racketeering activity in which the enterprise engages. *United States v. Phillips*, 664 F.2d 971, 1011 (5th Cir. Unit B 1981); *United States v. Lemm*, 680 F.2d 1193 (8th Cir.1982); *United States v. Anderson*, 626 F.2d 1358 (8th

Cir.1980). We do not agree, however, that the instruction delivered would have the effect Waldrop suggests.

The district court described the enterprise in question in terms of a group of individuals defined to include Bascaro, Villanueva, James, Fernandez, Waldrop, and Hobson who were associated in fact for the purpose of importing, possessing and distributing marijuana. We do not believe that this instruction could be misunderstood to permit the jury to ascribe to the enterprise smuggling ventures independently undertaken by one or more of its members. The instruction permitted the jury to find that Hobson and Waldrop's activities with respect to the Constellation smuggling venture could be included among the overt acts of racketeering activity needed to establish a "pattern" under the RICO statute, only if such activity was associated with the affairs of the enterprise, defined in terms of all named defendants and their common purpose. The court's refusal to read Waldrop's proposed instruction, therefore, was not fatal.

Waldrop further argues that even if the court's instruction was proper, it was error not to recite Waldrop's theory of defense. Waldrop's proposed instruction states as follows:

> Mr. Waldrop's theory of the defense is that he must be acquitted of the charges contained in Count 2 of this indictment, because the government has not proven, beyond a reasonable doubt, the following: (1) that he knowingly or willfully participated, directly or indirectly, in any enterprise established by Manuel Eric Villanueva, Jose Luis Acosta, and Antonio E. Bascaro through a pattern of racketeering activity; (2) that the evidence fails to establish that he committed two acts of racketeering which were connected, directly or indirectly, to the enterprise established by Manual Eric Villanueva, Jose Luis Acosta, and Antonio E. Bascaro.

A district court's refusal to deliver a defendant's requested instruction will constitute reversible error "if and only if the requested instruction (1) is correct, (2) is not substantially

covered by other instructions which were delivered, and (3) deals with some point in the trial so 'vital' that the failure to give the requested instruction seriously impaired the defendant's ability to defend." *United States v. Stone*, 702 F.2d 1333, 1339 (11th Cir.1983). We are satisfied that the requested instruction was substantially covered by other instructions delivered. The only difference between the "theory of defense" instruction requested and the instruction given was that the instruction given defined the enterprise in terms of its participants and purpose instead of its organizers, which for reasons given above is not a difference so vital as to impair the defendants' ability to defend under the instruction delivered.

We are further satisfied that the evidence supported the jury's finding that the Constellation episode was an affair of the enterprise and not a free-lance smuggling venture. The venture was headed by Cobb, a self-described leader of the enterprise. James was called upon to serve as counsel to the participants, just as he had been with virtually all of the affairs of the enterprise. Finally, Acosta assumed responsibility for the venture by stepping in to rescue Cobb after the venture had failed. Viewing the record in a light most favorable to the government, we hold that the above-mentioned facts could combine to lead a reasonable juror to conclude that the Constellation venture was an affair of the charged enterprise.

C. Importation and Possession of Marijuana with Intent to Distribute

The gist of Hobson and Waldrop's contention with respect to the possession and importation counts is that they never had constructive or actual possession of the marijuana, nor were they physically responsible for the importation. Hobson candidly acknowledges that to the extent he is linked to a conspiracy to possess or import, he may be found guilty of the completed acts of possession and importation notwithstanding that he did not physically commit them. *Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489

(1946). He points out, however, that before a defendant may be convicted of substantive offenses on the basis of acts committed by his co-conspirators, a jury instruction outlining that basis for liability must be given. *United States v. Monaco*, 702 F.2d 860, 881 (11th Cir.1983). Inexplicably, the government did not request and the district court did not deliver a *Pinkerton*-type instruction. The court did, however, instruct the jury that a defendant would properly be found guilty of a substantive offense were he to aid or abet another in its commission.

Hobson and Waldrop's convictions for possession of marijuana with intent to distribute must be upheld if the evidence is sufficient to sustain the finding that they had either constructive or actual possession, or that they aided and abetted another who had constructive or actual possession. We have little trouble holding that Waldrop had constructive possession over the marijuana seized at the Tallahassee warehouse. "Constructive possession consists of the knowing exercise or the knowing power or right to exercise dominion and control over the substance." *United States v. Knight*, 705 F.2d 432, 433 (11th Cir.1983). Testimony adduced at trial indicated that 40,000 pounds of the Tallahassee warehouse load was set aside for Waldrop; that Waldrop personally stacked a number of bales and set them aside with the intent to pick them up later; and finally, that he was stopped by law enforcement agents upon his return to the warehouse. Taken together, these facts amply demonstrate that Waldrop exercised dominion and control over the marijuana in question.

With respect to the Constellation venture, the evidence would not appear to support a finding that Hobson or Waldrop exercised either actual or constructive possession over the marijuana on board the aircraft. The mere fact that they had made a deposit of $1,500,000 on the incoming shipment does not satisfy the requirement that they exercised dominion and control over it. The absence of actual or constructive possession, however, does not foreclose the possibility that

they were properly convicted under an aider and abettor theory of liability. Hobson is mistaken in his belief that he may not be convicted as an aider and abettor when he was indicted as a principal only: "One who has been indicted as a principal may be convicted on evidence showing only that he aided and abetted the commission of the offense." *United States v. Oquendo*, 505 F.2d 1307, 1310 n. 1 (5th Cir.1975).

In *United States v. Trevino*, 556 F.2d 1265 (5th Cir.1977), the court set out the requirements for aiding and abetting possession of a controlled substance with intent to distribute:

> Trevino and Gonzalez were charged in this count under 21 U.S.C. § 841(a)(1) (1976), making illegal any possession of a controlled substance with intent to distribute, and 18 U.S.C. § 2 (1970), providing that "whoever . . . aids, abets, counsels, commands, induces or procures" the commission of a federal crime is punishable as a principal for the violation itself. To aid or abet another in the commission of a crime within the meaning of the statute requires that the defendant "in some sort associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed."

Id. at 1269 (citations omitted). In this case, Cobb indicated that he, Waldrop and Hobson were primarily responsible for the Constellation venture. Waldrop and Hobson advanced money to Cobb to purchase the marijuana in Colombia. After the initial airplane venture had failed, both Hobson and Waldrop made telephone calls to Cobb pressuring him to attempt a second airplane venture. Cobb agreed, after securing a promise that Hobson and Waldrop would purchase a substantial portion if not all of the load. These facts establish to our satisfaction that Hobson and Waldrop could properly be found to have associated themselves with the venture and to have sought by their actions to make the venture succeed. *Trevino*, 556 F.2d at 1269-70.

The appellants' reliance upon *United States v. Jackson* for a contrary conclusion is misplaced. 526 F.2d 1236 (5th Cir. 1976). There, the evidence indicated that Jackson assisted his co-defendant in the distribution of cocaine already in the possession of the co-defendant. Jackson's conviction for aiding and abetting his co-defendant in the possession with intent to distribute cocaine was reversed on appeal, on the ground that while evidence was sufficient to support his conviction for aiding and abetting the distribution of cocaine, there was no evidence that he aided and abetted the possession. The court's conclusion was based upon an absence of evidence that Jackson had helped his co-defendant obtain the cocaine; rather, it was clear that Jackson did not aid or abet his colleague until after the cocaine had come into the co-defendant's possession. In contrast, Hobson and Waldrop's efforts were directed toward assisting Cobb in acquiring the marijuana. The court's opinion in *Jackson* is thus wholly consistent with our conclusion that Hobson and Waldrop were properly convicted of possession under an aiding and abetting theory.

III. Bascaro

The only issue raised by Bascaro that merits discussion and that was not considered previously as a common issue, is his double jeopardy claim.[16] The government appears to acknowledge that Bascaro was previously tried and convicted of conspiracy to possess marijuana with intent to distribute in connection with a smuggling venture undertaken by the enterprise/conspiracy being prosecuted in the instant case. If true, this state of affairs would raise a question as to the validity of Bascaro's subsequent continuing criminal enterprise conviction and possibly his RICO

[16] As previously discussed in connection with Villanueva's continuing criminal enterprise conviction (CCE), conspiracy to import is a lesser included offense of CCE; in light of Bascaro's CCE conviction, we must therefore vacate his other conspiracy conviction on double jeopardy grounds.

conspiracy conviction in this case. *See United States v. Phillips*, 664 F.2d 971, 1015 n. 64 (5th Cir. Unit B 1981); *see generally id.* at 1004-1015. We do not, however, reach the merits of Bascaro's double jeopardy claim. The issue is raised for the first time on appeal; Bascaro's double jeopardy defense was thus waived by his failure to assert it at trial. *Grogan v. United States*, 394 F.2d 287, 289 (5th Cir.1967).

Bascaro attempts to justify his failure to raise the double jeopardy defense until now on the basis of the district court's denial of Bascaro's motion for a bill of particulars. This is an exercise in obfuscation. In order to make a timely objection to the instant prosecution on the double jeopardy grounds previously discussed, Bascaro needed only the indictment and record of judgment in the former prosecution, and the indictment in the present case. A bill of particulars would have furnished no additional relevant information.

Bascaro's motion for a bill of particulars, and his assignment of error to the court's refusal to grant that motion, relates to a different and less troubling double jeopardy claim. The function of a bill of particulars is to provide a defendant with information about the details of the charge against him if this is necessary to the preparation of his defense, and to avoid prejudicial surprise at the trial. *United States v. Diecidue*, 603 F.2d 535 (5th Cir.1979); *see also* C. Wright, *Federal Practice and Procedure* § 129. A bill of particulars has been held to be appropriate where necessary to permit the defendant to plead double jeopardy in the event of a subsequent prosecution of the same offense. *United States v. Gorel*, 622 F.2d 100, 104 (5th Cir.1979). The thrust of Bascaro's argument is that his activities in connection with the smuggling episode for which he had been previously convicted were not listed among the overt acts of the enterprise in the instant indictment, yet were used to convict him again here. He asserts that a bill of particulars would have revealed as much, but that as a consequence of the denial of his motion for a bill of particulars, Bascaro was unprepared to lodge a double jeopardy objection.

The motion for a bill of particulars was properly denied. Acts committed by Bascaro in connection with the episode for which he was previously tried were not included among the overt acts listed in the present indictment for the very simple reason that those acts were not part of the present indictment. The fact that various witnesses made passing references to the episode in the course of their testimony does not prove the contrary. In short, Bascaro was not convicted in this case on the basis of facts peculiar to the incident for which he had been previously tried, and a bill of particulars amplifying the details of the charges against him in this case would have served no purpose.

Conclusion

James raises no issues singular to him that warrant separate discussion. He and other defendants raise a number of questions concerning a variety of alleged prosecutorial misconduct that a review of the record reveals are wholly without merit. The convictions of Hobson, Waldrop, Fernandez, and James are affirmed. Villanueva's convictions for conspiracy to import a controlled substance and conspiracy to possess a controlled substance with intent to distribute are vacated, as is Bascaro's conviction for conspiracy to import. Their remaining convictions are affirmed.

AFFIRMED IN PART, VACATED IN PART.

APPENDIX 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5547

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANTONIO E. BASCARO,
PATRICK M. WALDROP,
RUSSELL HOBSON, III,
MANUEL ERIC VILLANUEVA,
GUSTAVO J. FERNANDEZ,
MANUEL W. JAMES,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Florida

ON PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

(Opinion October 1, 1984, 11 Cir., 1984, ...F.2d....)
(December 6, 1984)

Before HENDERSON and CLARK, Circuit Judges, and ATKINS,* District Judge.
PER CURIAM:

(✓) The Petitions for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of

*Honorable C. Clyde Atkins, U.S. District Judge for the Southern District of Florida, sitting by designation.

Appellate Procedure; Eleventh Circuit Rule 26), the Suggestions for Rehearing En Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestions for Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ *Thomas A. Clark*
United States Circuit Judge

APPENDIX 3

STATUTES INVOLVED

RICO definitions: 18 U.S.C. § § 1961 (1)(A), (D), (4), (5) [pertinent portions]

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving . . . dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year;

* * *

(D) any offense involving . . . the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

* * *

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

RICO prohibited activities: 18 U.S.C. § 1962(c), (d) [pertinent portions]

§ 1962. Prohibited activities

* * *

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of

which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . .

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Electronic eavesdropping: 18 U.S.C. § 2516(1)(e) [pertinent portions]

§ 2516. Authorization for interception of wire or oral communications

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

* * *

(e) any offense involving . . . the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marijuana, or other dangerous drugs, punishable under any law of the United States.

Controlled Substances Act penalties: 21 U.S.C. § 841(b)(4), (6)

§ 841. Prohibited acts

* * *

Penalties

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

* * *

(4) Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marijuana for no remuneration shall be treated as provided in subsections (a) and (b) of section 844 of this title.

* * *

(6) In the case of a violation of subsection (a) of this section involving a quantity of marijuana exceeding 1,000 pounds, such person shall be sentenced to a term of imprisonment of not more than 15 years, and in addition, may be fined not more than $125,000. If any person commits such a violation after one or more prior convictions of such person for an offense punishable under paragraph (1) of this paragraph, or for a felony under any other provision of this subchapter, subchapter 11 of this chapter, or other law of the United States relating to narcotic drugs, marijuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, and in addition, may be fined not more than $250,000.

APPENDIX 4

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY

IN RE: APPLICATION FOR ORDER AUTHORIZING INTERCEPTION OF WIRE AND ORAL COMMUNICATIONS OF CLYDE WALTON COBB, A/K/A CLYDE WILLIAM COBB, A/K/A BILL COBB; THOMAS DAN ABBEY; THOMAS EDWARD ALEXANDER; CARLTON CLIFFORD REEVES; JAMES LAVONNE SELLERS; JOHN R. BARNES; CLIFFORD WENTWORTH; MANUEL WINSTON JAMES; AND OTHER PERSONS UNKNOWN, TO OR FROM TWO (2) TELEPHONE FACILITY NUMBERS, (305) 931-8116 AND (305) 944-2184, LISTED TO BILL COBB, WITH AN ADDRESS OF 655 OCEAN BOULEVARD, GOLDEN BEACH, FLORIDA 33160.

AFFIDAVIT AND APPLICATION FOR AN ORDER AMENDING THAT ORDER AUTHORIZING INTERCEPTION OF ORAL AND WIRE COMMUNICATIONS ENTERED ON JANUARY 5, 1979.

BEFORE ME, N. JOSEPH DURANT, JR., CIRCUIT JUDGE of the ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, personally appeared Special Agent Stephen S. Dobson, who being first duly sworn, deposes and says:

1. He is the same Stephen S. Dobson who swore to the Affidavit and Application for an Order Authorizing the Interception of Wire and Oral Communications on Telephone Numbers (305) 931-8816 and (305) 944-2184. An Order Authorizing the Interception of Communications on the above numbers was entered by this court on January 5, 1979 and is attached hereto as "Exhibit A", made a part hereof and incorporated by specific reference thereto.

2. This Court's Order was immediately taken to the Southern Bell Telephone Co. whose agents informed your Affiant that they would be unable to complete the installation of the necessary equipment until Friday, January 12, 1979. This delay was explained to be necessary due to a lack of an essential piece of equipment and engineering problems.

3. On Friday, January 12, 1979, a law enforcement officer accompanied agents of Southern Bell to a location where the "cable pairs" for the telephones to be intercepted were housed. The agents of Southern Bell informed your Affiant that the "cable pairs" were not where they were supposed to be and that it would be necessary to make other equipment changes in order to effectuate the "hook up".

4. On that same date, January 12, 1979, agents of Southern Bell informed your Affiant of the following matters:

(A) On January 10, 1979, the subscriber to the telephone number (305) 931-8116 requested that his number be changed.

(B) On January 12, 1979, phone number (305) 931-8116 was changed to (305) 931-3643. The new number is assigned to the same telephone as (305) 931-8116 and said telephone is still located in the residence of Bill Cobb located at 655 Ocean Boulevard, Golden Beach, Florida.

(C) Southern Bell would no longer install the necessary equipment for your Affiant to commence interceptions on (305) 931-3643 until such time as they received an Amended Order from this Court.

WHEREFORE, your Affiant respectfully requests this Court to enter an Order Amending its Order of January 5,

1979 changing all references to telephone numbers (305) 931-8116 to (305) 931-3643.

/s/ *Stephen S. Dobson*
Special Agent
Florida Department of Law Enforcement

SWORN TO AND SUBSCRIBED before me this 15th day of January, 1979.

/s/ *N. Joseph Durant, Jr.*
Circuit Court Judge of the
Eleventh Judicial Circuit

APPENDIX 5

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY

IN RE: APPLICATION FOR ORDER AUTHORIZING INTERCEPTION OF WIRE AND ORAL COMMUNICATIONS OF CLYDE WALTON COBB, A/K/A CLYDE WILLIAM COBB, A/K/A BILL COBB; THOMAS DAN ABBEY; THOMAS EDWARD ALEXANDER; CARLTON CLIFFORD REEVES; JAMES LAVONNE SELLERS; JOHN R. BARNES; CLIFFORD WENTWORTH; MANUEL WINSTON JAMES; AND OTHER PERSONS UNKNOWN, TO OR FROM TWO (2) TELEPHONE FACILITY NUMBERS, (305) 931-3643 and (305) 944-2184, LISTED TO BILL COBB, WITH AN ADDRESS OF 655 OCEAN BOULEVARD, GOLDEN BEACH, FLORIDA 33160

SECOND AFFIDAVIT AND APPLICATION FOR AN ORDER AMENDING THAT ORDER AUTHORIZING INTERCEPTION OF ORAL AND WIRE COMMUNICATIONS ENTERED ON JANUARY 5, 1979

BEFORE ME, N. JOSEPH DURANT, JR., CIRCUIT JUDGE of the ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, personally appeared Special Agent Stephen S. Dobson, who being first duly sworn, deposes and says:

1. He is the same Stephen S. Dobson who swore to the Affidavit and Application for an Order Authorizing the Interception of Wire and Oral Communications on Telephone Numbers (305) 931-3643 and (305) 944-2184. An Order Authorizing the Interception of Communications on the above number was entered by this Court on January 5, 1979 and is attached hereto as "Exhibit A", made a part hereof and incorporated by specific reference thereto.

2. On January 26, 1979, telephone number (305) 944-2184 was changed to telephone number (305) 944-7669. The new number is attached to the same telephone

facility as (305) 944-2184 and is still located in 655 Ocean Boulevard, Golden Beach, Florida.

WHEREFORE, your Affiant respectfully requests this Court to enter an Order Amending its Order of January 5, 1979, so that all reference to telephone number (305) 944-2184 will be changed to telephone number (305) 944-7669.

/s/ *Stephen S. Dobson*
Special Agent
Florida Department of Law Enforcement

SWORN TO AND SUBSCRIBED before me this 29th day of January, 1979.

/s/ *N. Joseph Durant, Jr.*
Judge, Circuit Court of the Eleventh
Judicial Circuit of Florida

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CLERK

NO. 84-1148

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RUSSELL HOBSON, III,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. DOES THE GOVERNMENT HAVE AN OBLIGATION UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND UNDER THE FEDERAL RULES OF APPELLATE PROCEDURE TO CORRECT SERIOUS MISREPRENTATIONS OF FACT THAT IT MAKES TO A COURT OF APPEALS WITH RESPECT TO THE CONTENTS OF THE RECORD IN A MULTIDEFENDANT, COMPLICATED CASE, ESPECIALLY WHEN THE MISREPRESENTATIONS ARE CALLED TO ITS ATTENTION WITH SPECIFICITY AND THE GOVERNMENT HAS BOTH THE TIME AND THE OPPORTUNITY TO MAKE A CORRECTION?

2. MAY THE GOVERNMENT USE MARIJUANA OFFENSES AS PREDICATE ACTS TO ESTABLISH VIOLATIONS OF THE FEDERAL RACKETEERING STATUTE (RICO)?

3. WHERE A DEFENDANT HAS COMMITTED ONLY ONE ACT, MAY THE GOVERNMENT PROVE A PATTERN OF RACKETEERING ACTIVITY, AS REQUIRED TO CONVICT A DEFENDANT OF RACKETEERING, BY CHARGING THE SINGLE ACT IN TWO SEPARATE COUNTS AND CLAIMING THAT THE SINGLE ACT IS A PATTERN BECAUSE IT CONSTITUTES TWO OFFENSES?

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

This brief is filed pursuant to Rule 36.1 of the Rules of this Court. Consent to file has been granted by the Honorable Rex E. Lee, Solicitor General of the United States, and by James M. Shellow, Esq., counsel for the Petitioner. Letters of consent of both parties accompany this filing.

INTEREST OF THE *AMICI CURIAE*

The two organizations submitting this brief as amici curiae, the National Association of Criminal Defense Lawyers (NACDL) and the National Legal Aid and Defender Association (NLADA), represent lawyers, judges and other interested in our criminal justice system. The NACDL is a National non-profit organization based in Washington, D.C., with a membership of more than 4000 criminal defense lawyers, law professors and judges. Among the NACDL's stated objectives are the promotion and proper administration of criminal justice. The NLADA is a non-profit organization of public defender officers, legal services agencies and 2000 individual members, most of whom are engaged in private practice. Since 1911, the primary purpose of the NLADA has been to expand and improve the quality of legal services for the nation's poor.

Amici respectfully urge this Court to grant the petition for certiorari because it raises issues that are of general concern to lawyers and judges dealing with criminal cases in federal courts throughout the nation. This brief is written in support of the petition by Russell Hobson (petitioner) for consideration of his issues by this Court. With one exception, amici express no view on the merits of any question raised by petitioner; at this time their intention is to support his assertion that the case presents important questions of federal law deserving attention by the nation's High Court. The exception is that amici do support petitioner's argument that counsel have a duty of candor to appellate courts that requires accurate statements of a trial record, corrections of misstatements in appellate briefs, a response to specific allegations of factual errors in appellate briefs, and an attempt to correct misstatements of the record in appellate opinions that result from a misconception of the trial record.

QUESTIONS PRESENTED

1. DOES THE GOVERNMENT HAVE AN OBLIGATION UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND UNDER THE FEDERAL RULES OF APPELLATE PROCEDURE TO CORRECT SERIOUS MISREPRENTATIONS OF FACT THAT IT MAKES TO A COURT OF APPEALS WITH RESPECT TO THE CONTENTS OF THE RECORD IN A MULTIDEFENDANT, COMPLICATED CASE, ESPECIALLY WHEN THE MISREPRESENTATIONS ARE CALLED TO ITS ATTENTION WITH SPECIFICITY AND THE GOVERNMENT HAS BOTH THE TIME AND THE OPPORTUNITY TO MAKE A CORRECTION?

This case is typical of many federal criminal cases in the 1980's. It began when the government filed a 59 page indictment charging 12 individuals in 30 counts with a variety of offenses. The charges included racketeering, racketeering conspiracy, various other conspiracies and substantive violations of federal laws prohibiting importation and trafficking in controlled substances. The trial lasted approximately two weeks and produced thirteen (13) volumes of testimony plus numerous exhibits.

There is no doubt that the government established that some individuals were involved on a large scale with importation and distribution of marijuana. There seems to be no doubt, and we understand that petitioner has conceded throughout his appeal, that if the evidence is viewed in the light most favorable to the government there was evidence presented at trial which, if believed, would have warranted a jury's finding that on one, possibly two occasions, petitioner purchased large quantities of marijuana. Moreover, there seems to be no doubt, and

we believe this too is conceded by petitioner, that the government presented evidence which, if believed, would have warranted a jury's finding that on another occasion petitioner made a downpayment on a marijuana purchase that was never consummated.

Had the government charged petitioner with simple possession of marijuana, with attempted possession, or even with possession with intent to distribute (based on the quantity of marijuana purchased), it might well have convicted him and avoided the important questions that have worked their way to this Court. But the government chose not to pursue the obvious course with respect to to petitioner. Instead, it insisted upon charging petitioner with all of the crimes it attributed to the members of the group identified as running a fairly continuous marijuana importation and distribution operation.

Specifically, the government charged that petitioner has associated himself with a racketeering enterprise, which the indictment charges was "a group of individuals associated in fact for the purpose of importing multi-ton quantities of marihuana into the United States from a place outside of the United States, possessing multi-ton quantities of marihuana with intent to distribute and distributing within the United States, multi-ton quantities of marihuana," and that he had carried out the activities of the enterprise by making a downpayment on a purchase of marijuana (Count 2); that he conspired to violate the racketeering statute by agreeing to further the enterprise (Count 1); that he conspired with the other defendants to import marijuana (Count 3); that he imported marijuana by making a downpayment on a purchase that was never consummated (Count 4); that he conspired to distribute marijuana by the same conduct

that made him guilty of racketeering conspiracy (Count 5); and that he possessed marijuana with intent to distribute by making a downpayment on a purchase that was never consummated (Count 10).

Amici have read the pertinent record[1] in the case, the opinion of the court of appeals, and relevant portions of the government's brief in the court of appeals. This has enabled amici to make several observations with confidence, and these observations explain why amici believe that the ethical rule that petitioner would have this Court adopt is sound.

First, there is no doubt that four of petitioner's convictions depended upon proof that he knew that marijuana was being imported into the United States. The proof of racketeering, racketeering conspiracy, conspiracy to import marijuana, and actual importation all require some knowledge on petitioner's part that he was dealing with imported marijuana. The court of appeals recognized that this argument was before it.

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1. In preparing its amicus filing, amici did examine carefully the portions of the record in petitioner's case that were most important to their decision on whether to support the petition for certiorari. Amici also examined other relevant items. Among the documents that amici examined were the following: the indictment in the district court; petitioner's opening brief in the court of appeals; the government's brief in the court of appeals; petitioner's reply brief in the court of appeals; petitioner's petition for rehearing and rehearing en banc in the court of appeals; petitioner's certiorari petition; the decision of the court of appeals in *United States v. Phillips*, discussed *infra;* the petition for certiorari in *Gustafson v. United States*, No. 84-483, *cert. denied*, January 21, 1985; the government's brief in opposition in *Gustafson;* Gustafson's reply to the government's opposition; and a letter from petitioner's counsel to the Solicitor General, dated February 26, 1985, in which petitioner's counsel relates a Justice for correction of misstatements in its brief while petitioner's rehearing application was pending in the court of appeals.

Second, petitioner asserted at the trial level and in the court of appeals that he could not be convicted of conspiracy to distribute marijuana simply on the basis of proof that he purchased marijuana from the sellers once or twice. The court of appeals recognized that this argument was before it.

Third, petitioner asserted that he could not be convicted of possession of marijuana on which he had paid a downpayment because he never possessed it, neither actually nor constructively. The court of appeals recognized that this argument was before it.

Fourth, the briefs petitioner filed in the court of appeals —both the opening brief and the reply brief—stated to the court that there was no evidence to support a finding that petitioner knew that marijuana was being imported, that there was no evidence to prove that he was a continual or perpetual customer of the sellers of the marijuana, and that there was no evidence of either actual or constructive possession of marijuana in connection with the downpayment. The court of appeals recognized that this argument was before it.

Amici have analyzed the opinion of the court of appeals and have found that the court rejected petitioner's arguments as follows:

> a. The court rejected the argument that there was no evidence that petitioner was aware that marijuana was being imported because it found that he was one of the principal organizers of the purchase on which he made a downpayment, which involved the use of an airplane, and he was present at the organization's stash houses on numerous occasions.

b. The court accepted the argument that a simple buyer-seller relationship does not make the buyer a conspirator with the seller, but it concluded that petitioner purchased from the selling group on numerous occasions and was a frequent buyer.

c. The court rejected petitioner's argument that he was not in possession of the marijuana on which he made a downpayment because he was involved in a previous effort to buy marijuana that had failed and had pressured the participants in the failed venture to make another attempt to secure marijuana. Thus, he was guilty as an aider and abettor.

It seems readily apparent that the court of appeals relied heavily upon the government's brief in reaching its conclusions. The government's brief is as interesting for what it does not contain as for what it does. Beginning on page 5 of the brief, the government presents an extensive overview of its evidence. That overview continues for 31 pages. Petitioner's name appears in only three places. On page 6, the government asserts without a record citation that petitioner made cash payments for marijuana. On page 10, the government asserts that Hobson took delivery of marijuana on one occasion. The government offered a citation to the record. (Although the petitioner points out in his briefs that the government's two key witnesses disagreed over whether Hobson was present on this occasion, the government fails to address petitioner's assertion or to state whether or not there was a conflict on the point). On pages 29-30, the government asserts that petitioner was involved in an unsuccessful attempt to purchase marijuana and that he pressured the participants to make another attempt to obtain marijuana. These efforts are referred to by the government as the airplane

ventures. The government offered citations to the record in this instance also.

Anyone who reads the government's statement of its case must be struck by the low visibility of petitioner in the activities giving rise to the prosecution. The statement of the case offers virtually no support for most of the convictions secured by the government, since there is no description evidence demonstrating knowledge or importation and no description evidence demonstrating a continuous buyer-seller relationship. The government spends 100 pages in its brief dealing with many other defendants before returning to petitioner. Then, on page 137, without any citation to the record, the government asserted that "middlemen such as Hobson . . . stood by awaiting the completion of the counting and weighing, after which they immediately removed sizable portions of the massive loads" and implied that petitioner might have purchased marijuana on 25 or 30 occasions (citing two pages of the record). Again, without a record citation, the government asserted at page 137-38, that petitioner stood by ready to take delivery of all marijuana imported by other defendants.

The government asserted on page 139 that petitioner caused the importation of marijuana alleged in count 4. Although the government offered no citation to the trial record, it is clear from the indictment that the government misstated to the court of appeals the nature of count 4. It did not involve importation of marijuana on a ship called the *Tanila* as the government asserted; it involved a downpayment on a purchase of marijuana that was never consummated.

On pages 139-140, without any citation to the record, the government implies that petitioner was a continuous customer and not a purchaser of marijuana on isolated occasions.

Finally, the government repeats by implication on page 142 an argument made at pages 29-30 that petitioner had been involved in "airplane ventures" and that petitioner was in constructive control of the marijuana on which he had made a downpayment. The government cites a single page in the record when it refers to petitioner.

After the government filed its brief with the court of appeals, petitioner filed a reply brief pointing out numerous factual mistakes by the government. Once the court of appeals rendered its decision, petitioner sought a rehearing or rehearing en banc. For the second time, he pointed to the factual misstatements of the record that allegedly filled the government's brief and misled the court. Specifically, and with supporting citations to the record, petitioner identified in both the reply brief and the petition for rehearing the facts which he believed the government had misstated or the court of appeals had misunderstood:

> a. Petitioner purchased marijuana on only one or, at most, two occasions from members of the enterprise, depending on which of the government's key witnesses was believed.
>
> b. There was no evidence that petitioner was told that his downpayment on marijuana would be used to purchase imported marijuana. In fact, the government's evidence was that petitioner was to bring trucks to a restaurant where he was to be led to the marijuana. No witness, document or tape recording

suggested even a hint that an airplane would be used or that the marijuana would be imported.

c. There was no evidence that petitioner was involved in the first airplane venture which the government mentioned in its brief. In fact, the government's evidence established conclusively that he had no involvement.

d. There was no evidence that petitioner ever stood around stash houses awaiting for marijuana to be counted.

e. There was no evidence that petitioner had agreed to purchase any marijuana other than on isolated occasions. Certainly, no one identified him as a purchaser of last resort.

f. The indictment charging aiding and abetting possession of marijuana in Count 10 specified that petitioner was a principal and that he aided and abetted other named persons. Despite the fact that the indictment was drafted in other counts to charge aiding and abetting of persons known and unknown, the government argued an aiding and abetting theory not charged in the relevant count. The government compounded its error by mistakenly referring to one airplane venture which had no relationship at all to petitioner.

As noted at the outset, amici cannot identify whether petitioner's assertions of misstatements of fact are accurate, either individually or in their totality. Amici can and do assert, however, firm support for the proposition that when counsel represents to an appellate court that an opposing party has misstated the record and supports this representation with specific examples and record citations, an appellate court should require the party whose representations have been attacked to respond with specific citations to the record.

In petitioner's case, it is almost inconceivable that the government would not have felt obliged to respond to petitioner's reply brief and that it would have ignored the petition for rehearing. Yet, amici have discovered that the government ignored both filings (at least officially in the court of appeals, since not a single piece of paper was filed in response to either the reply or the petition). Amici also have learned that counsel for petitioner telephoned the Appellate Section of the Department of Justice to implore it to check the record following the court of appeals' decision and before the petition for rehearing was filed. The government declined to file anything further with the court of appeals.

Amici urge this Court to adopt a rule that would require litigants whose representations of the record are attacked, and who have failed to support their statements with complete record citations, to respond to the attacks. In a case with many defendants and many counts, a record that runs 13 volumes, and separate issues raised by the several defendants who are convicted, it simply is not realistic to assume that each judge on a panel of the court of appeals (or an *en banc* court) will read each page of the record to check for himself or herself whether unsupported assertions in a brief are fair representations of the record. The natural tendency is to trust the brief, especially when it is filed in the name of the United States.

Were the Court to adopt the rule suggested herein and by petitioner, a court of appeals, by checking the challenged facts against specific citations to the record, could assure itself that crucial record references are accurate and could correct any errors in briefs. Without adoption of such a rule, the truth is that complex cases may be

decided on the basis of incorrect assumptions about the record.

Amici agree with petitioner that the suggested rule would further the goal of Federal Rule of Criminal Procedure 28(a)(3), which requires a party to make "appropriate references to the record" in its statement of facts. certainly, complicated cases may be well suited to briefs that state facts throughout. But such briefs should not be immune from the requirements of Rule 28(a)(3).

Amici further agree that the principles of due process that underlie this Court's decision in *United States v. Agurs*, 427 U.S. 97 (1976), and the earlier cases discussed therein should apply with the same force on appeal as at trial. Thus, when the government has been placed on notice that its statements to a court are false, it has a duty to take action to assure that it does not mislead the court. Misstatements of fact do as much damage on appeal as they do at trial.

Although amici cannot take a position at this time on the merits of the allegations that the government misrepresented facts and that the court of appeals misapprehended the true state of the record, they do believe that if these allegations prove to be in large part correct, at a minimum a remand for a new appeal in which the government would be required to file a brief that conforms to Rule 28 and to basic notions of fairness and due process should be required. Should this Court grant certiorari on all issues raised by petitioner, a new trial might be required, depending on the disposition of the other issues raised in the petition. If a new trial is required, a remand to the court of appeals would, of course, be unnecessary.

2. MAY THE GOVERNMENT USE MARIJUANA OFFENSES AS PREDICATE ACTS TO ESTABLISH VIOLATIONS OF THE FEDERAL RACKETEERING STATUTE (RICO)?[2]

Petitioner has presented to this Court substantial arguments in support of the proposition that the Congress enacted the federal racketeering statute in 1970 specifically excluded marijuana offenses from its coverage. NACDL has made no effort to independently examine the legislative history, except to compare the history compiled by petitioner with the history and analysis offered to this Court by the Solicitor General in *Gustafson v. United States,* No. 84-482, cert. denied, January 21, 1985. Without taking a position on the merits of the issue raised by petitioner, Amicus NACDL respectfully requests that this Court recognize the substantiality of the question presented and review it according to the same standards of statutory construction that the Court has employed in the last several years in analyzing RICO itself and other statutes.

This Court has said on many occasions that the starting point for analysis of a statute is its language. See, e.g., *Lewis v. United States,* 445 U.S. 55, 60 (1980). It has made this point specifically with respect to the racketeering statute in *United States v. Turkette,* 452 U.S. 576, 580 (1981). In *Turkette,* the Court indicated that the structure of a statute was also important in determining its purpose. *Id.* at 586-87. The Court also declined to adopt the rule of lenity in deciding *Turkette,* reasoning

2. The NLADA joins this brief only on the first question. The NLADA has made no judgment as to the merits of the next two questions. It has determined only that these questions are outside the principal areas of interest of the members of the Association.

that the rule should operate only to resolve an ambiguity and there was no ambiguity to resolve in the case. *Id.* at 587 n. 10.

Applying the *Turkette* analysis to his claim that the statute does not reach marijuana transactions, petitioner notes that 18 U.S.C. § 1961(1)(D) defines predicate acts as including offenses "involving . . . the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in *narcotic or other dangerous drugs*, punishable under any law of the United States." (Emphasis added). The word "marijuana" is excluded even though it is explicitly included in the federal wiretap statute sponsored by the same Senator (McClellan) who sponsored RICO, authored by the same person who authored RICO (Robert Blakey),[3] and drafted by the same committee (Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee) that promulgated RICO.

Moreover, Professor Blakey himself appears on petitioner's brief and repeats his analysis of the legislative history that he made in 1980 in his published materials on RICO, *Materials on RICO: Criminal Overview*, 1 Techniques in the Investigation and Prosecution of Organized Crime 24 (Cornell Institute on Organized Crime, Blakey ed. 1980). Blakey refers to the decision to exclude marijuana as a conscious one, made despite suggestions by the Department of Justice that marijuana should be within the coverage of RICO.

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3. Federal courts have recognized Blakey as the principal author of RICO. See *United States v. Lee Stoller Enterprises, Inc.*, 652 F.2d 1313, 1319 n. 10 (7th Cir.) (en banc), *cert. denied*, 454 U.S. 1082 (1981). This Court has recognized his role in drafting the wiretap statute. *United States v. Giordano*, 416 U.S. 505, 517-18 & n. 7 (1974).

Petitioner has offered the Court the intertwined legislative history of RICO and the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 801-966. His petition cites congressional drafting in 1970 that covers all controlled substances, including marijuana, as well as other statutes which provide special treatment for marijuana. It appears from this history that Congress knew both how to include marijuana and how to exclude it from the scope of various statutes.

The "plain language" of RICO, read in light of the structure of the statute and its relationship with the wiretap statute and the Comprehensive Drug Abuse Prevention and Control Act, would appear to support petitioner's conclusion. That conclusion is bolstered by petitioner's explanation as to why Congress would have treated marijuana differently from other controlled substances—to wit, to avoid having small marijuana distributors, who might be misdemeanants under the 1970 drug reform statute, from being treated as racketeers as a result of state laws punishing in 1970 even small transfers of marijuana as gifts as felonies.

The government's response to a similar petition, which did not have Professor Blakey of counsel, in the *Gustafson* case essentially asks this Court to ignore the choice of language, the legislative history and the interrelationship of the wiretap, drug reform and RICO statutes. This, amicus NACDL respectfully suggests, is precisely what the Court ought not do.

Earlier this term in *Garcia v. United States,* 105 S.Ct. 479 (1984), this Court reaffirmed its approach to statutory construction in criminal cases. The Court looked to the statute as enacted and found that it was plain and

unambiguous. It analyzed the structure of the statute and it looked to the legislative history for congressional intent. *Id.* at 482-84.

Thus far, the language, its background and the intent of Congress appear to support petitioner's reading of the statute. That alone might be sufficient reason for amicus to support the petition for certiorari in this case. But there is another reason, more difficult to articulate and more important to the long range development of justice in federal courts. That reason is the importance of a perception of this Court as evenhanded in its treatment of federal statutes—i.e., favoring neither the government nor the accused, but reading statutes according to a rule of law.

There is a perception—unfair perhaps, but nonetheless real—among many lawyers who represent defendants in criminal cases that the canons of statutory construction in recent years are used only to produce expansive, rather than restrictive readings. Simply stated, there is fear that the Court will avoid cases which might result in narrowing constructions of a criminal statute in favor of cases in which the principles articulated in the cases cited above will favor the government.

This perception and related fear can best be explained by a single question asked by many who are familiar with this petition. Before putting the question, amicus NACDL would make an observation: Amicus believes that the petitions filed with the Court over the last several years probably demonstrate more than citations to lower court decisions that the racketeering statute is used with increasing frequency every year. It has become a mainstay in the government's prosecution of crime. In light of this observation, amicus NACDL puts the following

question: *If the court of appeals had accepted petitioner's argument and held that RICO does not cover marijuana offenses, is there any doubt that this Court would have granted review at the government's behest?*

It would be hyperbole to suggest that the answer that amicus receive when this question is asked always is "yes," but it would be untrue to say that the answer is often "no". NACDL believes that the importance of a question like the one posed by petitioner should be determined without regard to which party prevailed in the lower court.

Amicus NACDL wishes to emphasize that they do not argue that should the Court grant review, it might not reject the petitioner's arguments. But, should the Court do so, amicus believes the analysis almost certainly would have to be more persuasive than the government's brief in opposition in *Gustafson.*

The government suggested in *Gustafson* that there was no conflict in the circuit as to the reach of RICO. This is true, but it also is misleading. For all practical purposes only one circuit has yet considered the question raised by petitioner. The panel that decided petitioner's case cited *United States v. Phillips,* 664 F.2d 971 (5th Cir. 1981) (Unit B), *cert. denied,* 457 U.S. 1136 (1982), and indicated that it was bound by that decision. In fact, the *Phillips* court never considered the language of the statute, the relationship of the statute to the wiretap and drug reform legislation, or any legislative history. Now the law of the circuit is, without consideration, that marijuana falls within RICO.

Although a denial of certiorari is technically supposed to have no precedential significance, the fact is that if

this Court denies petitioner's certiorari petition after having denied Gustafson's, the government will rely upon both cases as expressing this Court's judgment that the issue is not important enough for it to examine de novo. The way of appellate courts is to follow this Court's lead. They are likely to cite the Eleventh Circuit's decisions and this Court's denial of review and close their eyes to the issue.

The question presented will never be more clearly focused. The legislative history, the statutory background and the language are before this Court. The trial will only get older with time. The NACDL asks this Court to examine petitioner's claim, a defendant's request that the statutory canons this Court has used to sustain expansive readings of criminal statutes be used evenhandedly to narrow a particular statute. Should this Court grant review and permit amicus NACDL to address the merits of the claim, amicus would be honored to do so.

3. WHERE A DEFENDANT HAS COMMITTED ONLY ONE ACT, MAY THE GOVERNMENT PROVE A PATTERN OF RACKETEERING ACTIVITY, AS REQUIRED TO CONVICT A DEFENDANT OF RACKETEERING, BY CHARGING THE SINGLE ACT IN TWO SEPARATE COUNTS AND CLAIMING THAT THE SINGLE ACT IS A PATTERN BECAUSE IT CONSTITUTES TWO OFFENSES?

The analysis of this Court's treatment of statutory construction of criminal statutes offered in connection with the second question is equally applicable to the third question.

The RICO statute requires a "pattern of racketeering activity" to sustain a conviction. 18 U.S.C. § 1962(c).

A pattern of racketeering activity requires more than one act. 18 U.S.C. § 1961(5). The trial judge instructed the jury in petitioner's case that to convict petitioner, the jury had to believe that he was guilty on Counts 4 and 10. These counts charged petitioner with importation of marijuana and possession as a result of his doing a single act—i.e., making a downpayment on a purchase of marijuana.

The government argued, and the court of appeals agreed, that the downpayment could qualify as two acts because it could support two substantive convictions. But, this analysis appears to fly in the face of the statute, 18 U.S.C. § 1961(5), which defines a pattern of racketeering activity as requiring

> at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act.

This suggests that one act will not suffice, especially in view of the fact that the statute does not require "two crimes." Instead two acts must be proved.

This Court stated in *United States v. Turkette,* 452 U.S. at 583, that the pattern of racketeering envisoned by the statute is "a *series* of criminal acts" as defined by the statute. (Emphasis added). Thus, the construction by the court of appeals is inconsistent with the face of the statute and this Court's dictum concerning its import.

Furthermore, the government's argument is contrary to its own guidelines, which were in effect when the indictment was returned in this case. The government adopted six guidelines on January 16, 1981, which are incor-

porated in the United States Attorney's Manual, Title 9, Criminal Division, as Section 9-110.310 through 9-110.-360. Guideline IV reads as follows:

> No indictment shall be brought charging a violation of 18 USC 1961(c) based upon a pattern of racketeering activity growing out of a single criminal episode or transaction.

The Commentary to the Guidelines is as follows:

> The purpose of these guidelines is to prevent a pattern of racketeering activity being charged which lacks the attributes which Congress had in mind but which is literally within the statute.

In *Garcia v. United States,* 105 S.Ct. at 485 n. 4, this Court paid attention to the way in which government prosecutors treated a criminal statute. Petitioner does not ask the Court to hold that the guidelines are binding law, but merely to recognize that they were adopted at a time when the government was beginning to make substantial use of the RICO statutes and deserve to be given some weight.

It appears that the language of the statute, the language of this Court in *Turkette,* and the language of the Department of Justice's guideline all suggest that one act is not enough to make out a pattern. Amicus believes that the issue raised by petitioner warrants plenary consideration by this Court for many of the same reasons that the second question does. Once more, amicus NACDL would be honored, if review is granted, to submit its views on the merits if the Court wishes it to do so.

CONCLUSION

For the reasons stated in this brief, amici respectfully urge this Court to grant petitioner's request for a hearing in the Supreme Court of the United States.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Brief of Amicus Curiae, National Association of Criminal Defense Lawyers and National Legal Aid and Defender Association has been mailed to United States Solicitor General, Rex E. Lee, Esq., Department of Justice, Room 5614, Washington, D.C. 20530 and Mr. Mervyn Hamburg, Esq., Attorney, Appellate Section Criminal Division, Department of Justice, P. O. Box 899, Ben Franklin Station, Washington, D. C., counsel for respondent, and Mr. James M. Shellow, Esq., 222 East Mason Street, Milwaukee, Wisconsin 53202, on this the _____ day of March, 1985.

GERALD H. GOLDSTEIN

APPENDIX A

U.S. DEPARTMENT OF JUSTICE
Office of the Solicitor General
Washington, D.C. 20530

February 14, 1985

Gerald H. Goldstein, Esquire
Goldstein, Goldstein and Hilley
29th Floor Tower Life Building
San Antonio, Texas 78205

Re: Russell Hobson, III v. United States
No. 84-1148

Dear Mr. Goldstein:

In response to your letter of February 11, 1985, I hereby consent to the filing of a brief amicus curiae on behalf of the National Association of Criminal Lawyers in the Supreme Court in this case.

Sincerely yours,

/s/ REX E. LEE
Rex E. Lee
Solicitor General

APPENDIX B

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RE: RUSSELL HOBSON III v. UNITED STATES
No. 84-1148, United States Supreme Court

Gentlemen:

On behalf of my client in the above-captioned matter, Russell Hobson, I hereby consent to the filing of an amicus curiae brief in this case by the National Association of Criminal Defense Lawyers and the National Legal Aid and Defender Association.

Very truly yours,

SHELLOW, SHELLOW & GLYNN, S.C.

By: /s/ JAMES M. SHELLOW
James M. Shellow

JMS:pap

cc: Mr. Rex Lee
Mr. Alexander Stevas

Office - Supreme Court, U.S.
FILED
MAY 21 1985
ALEXANDER L. STEVAS,
CLERK

(3) (2) (2)

Nos. 84-1148, 84-1164, and 84-1403

In the Supreme Court of the United States

OCTOBER TERM, 1984

RUSSELL HOBSON, III, PETITIONER

v.

UNITED STATES OF AMERICA

PATRICK C. WALDROP, PETITIONER

v.

UNITED STATES OF AMERICA

MANUEL ERIC VILLANUEVA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether marijuana offenses may serve as predicate offenses for prosecutions under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962.

2. Whether two or more offenses arising out of the same criminal episode satisfy the predicate act requirement of the RICO statute.

3. Whether the jury instructions were sufficient to ensure that petitioner Waldrop would not be convicted on the RICO charges in the indictment unless the jury found the existence of an enterprise and the commission of multiple enterprise-related offenses.

4. Whether the court of appeals correctly sustained the validity of two amendments to a wiretap authorization issued by a state judge.

5. Whether petitioner Hobson was deprived of due process because the court of appeals' review of his sufficiency claim allegedly was based upon inaccurate factual statements in the government's brief.

6. Whether a pre-trial order disqualifying petitioner Hobson's original counsel because the anticipated trial testimony of two government witnesses was likely to implicate the lawyer in some of the charges in the indictment became erroneous when the implicating evidence was not adduced at trial.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the courts of appeals (Pet. App. 1-50)[1] is reported at 742 F.2d 1335.

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[1]"Pet. App." refers to the appendix to the petition in No. 84-1148 unless otherwise indicated.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 1984. Petitions for rehearing filed by each petitioner were denied on December 6, 1984 (84-1148 Pet. App. 51-52; 84-1164 Pet. App. C1-C2; 84-1403 Pet. App. 51-52). The petition for a writ of certiorari in No. 84-1148 was filed on January 16, 1985, the petition in No. 84-1164 was filed on January 17, 1985, and the petition in No. 84-1403 was filed on March 5, 1985.[2] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Florida, petitioners were convicted of conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act (RICO) (Count 1); the completed RICO substantive offense (Count 2); conspiracy to import marijuana (Count 3); importation of marijuana (Count 4 (Hobson and Waldrop only)); conspiracy to possess marijuana with intent to distribute (Count 5); possession of marijuana with intent to distribute (Count 8 as to Villanueva, Count 9 as to Waldrop, and Count 10 as to Waldrop and Hobson); and engaging in a continuing criminal enterprise (Count 25 as to Villanueva), in violation of 18 U.S.C. 1962 and 21 U.S.C. 963, 952, 846, 841 and 848. Petitioner Hobson was sentenced to consecutive terms of imprisonment for each count on which he was convicted totalling 35 years; he also was fined a total of $110,000 on Counts 1 through 5 and Count 10. Petitioner Waldrop was sentenced to consecutive terms of imprisonment for each count on which he was convicted totalling 40 years; he also was fined various sums on each count, totalling $125,000.

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[2]On January 19, 1985, Justice Powell extended the time for the filing of petitioner Villanueva's petition for a writ of certiorari (No. 84-1403) to and including March 6, 1985.

Petitioner Villanueva's consecutive sentences totalled 60 years' imprisonment, and his cumulative fines amounted to $220,000. In addition, each petitioner was given a two-year special parole term. The court of appeals affirmed the convictions of Hobson and Waldrop in all respects. In light of the affirmance of his continuing criminal enterprise conviction, Villanueva's convictions for conspiracy to import marijuana and conspiracy to possess marijuana with intent to distribute (Counts 3 and 5) were vacated on double jeopardy grounds (see *Jeffers* v. *United States,* 432 U.S. 137 (1977)). Villanueva's convictions on all other counts were affirmed.

The evidence showed that in late 1977 Villanueva and co-defendants Jose Acosta and Antonio Bascaro were operating a large marijuana importation organization in southern Florida (38 R. 148-150).[3] In the latter part of that year, Clyde ("Bill") Cobb became a member of the organization, assuming responsibility for storing the marijuana after importation and distributing the marijuana to wholesalers (38 R. 150). Before that year's end, Cobb recruited his brother-in-law, Dan Abbey, to keep track of the organization's accounts (40 R. 10). Abbey estimated that during the time of his participation in the enterprise approximately 750,000 to 1.5 million pounds of marijuana had been imported and distributed, generating proceeds in excess of $175,000,000 (40 R. 66-67).

In December 1977, the enterprise moved its operations to northern Florida (38 R. 150-151; 40 R. 10-11). A farm suitable for storing marijuana was located near Cottondale, Florida (38 R. 150). Cobb made a cash down payment of $180,000 to buy the farm, using funds belonging to Acosta and Bascaro and delivered to him by petitioner Villanueva (38 R. 152-153). Shortly thereafter, more than 40,000

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[3]"R." refers to the 50-volume record on appeal.

pounds of marijuana that had been carried aboard a converted shrimper, the *Tanila,* was transferred to the farm (40 R. 10-12). Villanueva was among those supervising the offloading (40 R. 11). Within two or three days, several buyers, including Waldrop and Hobson, arrived at the farm to purchase quantities of the cargo (38 R. 154). On this occasion, Waldrop bought 10,000 pounds (40 R. 14). After the entire load had been distributed, Abbey collected the moneys due from the buyers; in turn, he made periodic trips to Acosta's house in the Miami area, where he turned the payments over to Villanueva (40 R. 15-16). The total amount delivered for the *Tanila* load was between $8 and $9 million (40 R. 15).

In January 1978 another vessel, the *Navigator,* arrived at a clandestine offloading site near Fort Walton Beach (40 R. 18-19), and 40,000-45,000 pounds of marijuana were offloaded in the presence of Villanueva and other supervisors (38 R. 150; 40 R. 19-20). The cargo was transported to the Cottondale farm, weighed and stored there (34 R. 134-135; 40 R. 20), and subsequently distributed to customers, including Waldrop and Hobson (34 R. 135-136; 38 R. 157-158). Following distribution, Abbey once again made the rounds of the buyers to secure payment. He then proceeded periodically to Acosta's home to hand over the receipts to either Acosta or Villanueva. The total amount collected was about the same as for the *Tanila* load—$8 or $9 million. 40 R. 20-21.

After a third load of marijuana had been stored at the Cottondale farm and distributed to customers from that site, the leaders of the trafficking enterprise became concerned that the neighbors were suspicious of activities at the farm. Accordingly, they purchased a fishing camp on the Aucilla River in the Florida panhandle and a farm in Madison County to serve as new offloading and storage sites. 38 R. 160-163. In mid-March a load of marijuana arrived at

the fishing camp by vessel, and the cargo was successfully transferred to the Madison County farm, from which it was distributed without incident (38 R. 162). As before, Abbey collected millions of dollars from the buyers of this shipment and turned the proceeds over to Villanueva (40 R. 49).

In late March or early April another vessel, the *Miss Too Nicey,* reached the fishing camp (36 R. 139-140; 38 R. 163). In the presence of Acosta, Bascaro, and Villanueva, the vessel's 73,000-pound cargo of marijuana was offloaded and trucked to the Madison County farm (36 R. 140-141, 144; 38 R. 163). There, the weighing and storage was conducted in the presence of Villanueva, Bascaro, and Thomas Alexander (36 R. 141). Shortly thereafter, Hobson and an associate came to the farm in an 18-wheel truck to take 25,000 pounds of marijuana. Hobson revealed to Alexander that he and Waldrop were partners. 36 R. 141-143; 40 R. 55.

The use of the Madison County farm as a storage facility lasted only about one month. During that period, state law enforcement officers became suspicious of the activities occurring at the farm and commenced surveillance (31 R. 68-70). When Alexander and others detected the surveillance, the leaders of the enterprise decided to find a new storage facility (36 R. 145).

In April 1978 the enterprise rented a warehouse in Tallahassee, and the 6,000 pounds of marijuana remaining at the Madison County farm were transferred to the warehouse (36 R. 146-147). That warehouse proved to be too small to store an expected double load—80,000 pounds of marijuana. Consequently, the enterprise leased a second warehouse in Tallahassee. GX 10; 31 R. 148-150. On two consecutive evenings in late April, boatloads of marijuana were offloaded at the fishing camp and trucked to the larger warehouse in Tallahassee (36 R. 147; 38 R. 168-169). Waldrop visited the warehouse and set aside 40,000 pounds for

pickup later that week (40 R. 53). Before Waldrop could make his pickup, however, state law enforcement officers entered the warehouse, seized 70,293 pounds of marijuana, and arrested six individuals (31 R. 74-79, 93, 151; 36 R. 148; 40 R. 52-53). The officers also seized detailed records of amounts received, amounts distributed, and money owed by a number of individuals. Listed among the debtors were "Pat" (Waldrop) and "Russ" (Hobson) (31 R. 85-89).

While the officers were inspecting the warehouse, Waldrop arrived there in a rented car. He was stopped and questioned by a police officer, and he consented to a search of a briefcase in his car. Inside the briefcase the officer found a notebook and loose sheets, all of which contained records of marijuana transactions. 31 R. 79-81. Some of the items (GX 7) were duplicates of records kept by Abbey for Acosta and Villanueva (GX 145; 40 R. 44-46). Although the records were seized, Waldrop was released (31 R. 89-90). He telephoned Cobb and reported the loss of the records (38 R. 170).

Because of the loss of the large Tallahassee warehouse, the need for a new storage site again arose. That need became urgent when Cobb learned that 150,000 pounds of marijuana already were en route to Florida (38 R. 175). A member of the enterprise located a tobacco barn deemed suitable for use as a storage facility near the town of Quincy in Gadsden County, Florida (*ibid.*).

Three vessels were involved in the 150,000 pound delivery. The first was successfully offloaded, after which the marijuana was transferred to the Quincy barn (38 R. 175). The other two vessels were sent out to sea for a few more days because the offloaders could not handle them immediately (38 R. 175-176). While at sea, those vessels were boarded by Coast Guard officers, and their cargo of marijuana was seized (31 R. 238-240; 34 R. 4-6; 38 R. 175-176). On July 21, 1978, local officers, armed with a warrant,

searched the Quincy barn and seized numerous bales of marijuana and drug paraphernalia (31 R. 253-255).

Thereafter, a meeting was held at Cobb's home in southern Florida to discuss moving the enterprise to Georgia (38 R. 177-178). Among the participants in the discussions were Cobb, Acosta, Bascaro, and Villanueva (38 R. 178-179). Arrangements were made to use Morgan's Boat Dock in Savannah (33 R. 22-25; 34 R. 154). On November 24, 1978, the *Sea Star* arrived there with a cargo of marijuana weighing 40,224 pounds (32 R. 32-37). Federal law enforcement officers intercepted the vessel and seized its cargo (32 R. 31-35).

Shortly thereafter, Cobb decided to engage in a new venture (39 R. 44-47). Instead of using boats, Cobb decided to attempt to smuggle marijuana by airplane (38 R. 186). In mid-January 1979, pursuant to Cobb's plan, James McDonnell flew a DC-3 airplane to Colombia, took on a cargo of marijuana, and flew back to Fort Lauderdale. The plane and its cargo were seized by federal and local law enforcement agents at the Fort Lauderdale airport. 32 R. 127, 151-154.

Two weeks later, McDonnell agreed to make a second attempt to smuggle marijuana by aircraft (32 R. 156-157). Waldrop had made a down payment of $1,500,000 to Abbey, and he and Hobson consequently expected to receive a substantial part of the planeload of marijuana (38 R. 187; 40 R. 55). Waldrop and Hobson pressured Cobb to produce the marijuana or return the $1,500,000 (38 R. 220-223). On February 13, 1979, McDonnell and two others flew to Colombia in a Lockheed Constellation and obtained 25,795 pounds of marijuana (32 R. 140, 160-161). Trucks furnished by Waldrop and Hobson were readied to meet the airplane at a clandestine site to take possession of most of the Constellation's cargo (39 R. 10-12). On the return flight,

however, fog and engine problems prevented the Constellation from landing at the clandestine site (32 R. 163-166). McDonnell finally landed at an airport in Panama City in the early morning hours of February 14 (32 R. 166). Federal agents arrested the crew members and seized the marijuana (32 R. 132-140, 167; 38 R. 187-188). Several hours after the Constellation was supposed to have arrived at the pre-arranged site, Hobson telephoned Cobb to ask what had happened (39 R. 18).

At the same time that Cobb was planning the airplane smuggling ventures, he met with Acosta, Bascaro, and Villanueva to discuss a second attempt to bring a boatload of marijuana into Savannah (38 R. 186, 188). In March 1979 a vessel with 40,000 pounds of marijuana reached Savannah, but it was detected there by law enforcement officers (38 R. 188-191). After that loss, the principals decided once again to use the Aucilla River fishing camp as their offloading site (38 R. 191). In April 1979, two boatloads of marijuana were successfully offloaded there (38 R. 193). After distribution to buyers, Abbey made his rounds and then transferred between $15 and $18 million to Villanueva or another individual acting in his stead (40 R. 56-57).

No further activity occurred until early 1981. Then, the *Miss Sunbury* was sent from Key West to obtain a load of marijuana (38 R. 194-195). Carrying 23,460 pounds of marijuana, the *Miss Sunbury* reached the Aucilla River fishing camp without detection (32 R. 210-211; 38 R. 195); however, it was sent back to sea without having been emptied of its cargo because Villanueva, after performing a quasi-religious ritual, had determined that the time for offloading was not satisfactory (38 R. 195). On February 26, 1981, Customs officers boarded the *Miss Sunbury* and seized its cargo of marijuana (32 R. 207, 211).

ARGUMENT

1. The sole argument common to all three petitions (and the only issue raised by petitioner Villanueva) is he contention that petitioners' large scale marijuana trafficking scheme does not constitute "racketeering activity" within the meaning of RICO, 18 U.S.C. 1961(1)(D). The court of appeals' conclusion to the contrary is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review of the issue is therefore unwarranted.

The RICO statute, 18 U.S.C. 1962(c), makes it unlawful for any person associated with an enterprise engaged in interstate commerce to participate in the conduct of the affairs of the enterprise through a pattern of racketeering activity. "Racketeering activity" is defined under 18 U.S.C. 1961(1)(D) to include certain state felonies and enumerated violations of federal criminal laws, including "the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotics or other dangerous drugs, punishable under any law of the United States." Petitioners contend that the absence of any explicit mention of marijuana in this definition signifies an intent on the part of Congress to exclude marijuana violations from the class of offenses that may form the basis for a conviction under RICO. Petitioners therefore claim that their RICO convictions, which were premised solely upon involvement in marijuana trafficking, must be reversed.

As petitioner Waldrop notes (84-1164 Pet. 28), the same issue was raised in *Gustafson* v. *United States,* cert. denied, No. 84-482 (Jan. 21, 1985). We are furnishing petitioners' counsel with copies of our brief in opposition in *Gustafson;* that brief fully responds to most of petitioners' contentions. As we noted in that brief (at 5), it appears that Congress deliberately deleted a specific reference to "marijuana" that had appeared in early drafts of the RICO legislation

because marijuana was encompassed within the phrase "other dangerous drugs" that was added to the bill that Congress enacted into law. Consequently, the earlier references to marijuana became surplusage. Moreover, the express legislative mandate that the RICO statute "shall be liberally construed to effectuate its remedial purposes" contradicts the narrow interpretation advanced by petitioners. Pub. L. No. 91-452, § 904(a), 84 Stat. 947, 18 U.S.C. 1961 note; see 84-482 Br. in Opp. at 6-7. Certainly, the purposes of the RICO statute are furthered by applying it to offenses relating to the sort of massive marijuana trafficking enterprise involved in this case.

Petitioner Hobson makes one additional argument on the marijuana issue. He contends (84-1148 Pet. 11) that the enactment in 1980 of an amendment to 21 U.S.C. 841 increasing the penalties for large-scale marijuana trafficking was deemed necessary by Congress because at that time —ten years after the passage of RICO—Congress was concerned that the penalties for trafficking in marijuana were inadequate. Hobson argues that if Congress had believed that dealing in marijuana was encompassed within the RICO statute, which carries a maximum prison term of 20 years and a fine of up to $25,000 upon conviction (18 U.S.C. 1963(a)), it would not have been concerned about the fact that the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. 801 *et seq.*, limited the prison term for a convicted marijuana violator to five years, no matter how much marijuana was involved in the case. In Hobson's view, therefore, the 1980 amendment to 21 U.S.C. 841 was the result of Congress's belief that the 20-year RICO penalty did not apply to marijuana cases.

However, as Hobson readily admits (84-1148 Pet. 11), Congress made no mention of RICO coverage when it increased the penalties for trafficking in marijuana. The legislative history shows that the increased penalties were

passed as an amendment to the Infant Formula Act of 1980, Pub. L. No. 96-359, 94 Stat. 1190 *et seq.*, and that the sole purpose of the amendment was to correct what Congress believed to have been an oversight in the enactment of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. 801 *et seq.* As Representative Carter stated, "Mr. Speaker, in 1970, I was a member of the Commerce Committee when it passed the Controlled Substances Act. Unfortunately, we did not make the penalties for marihuana as strict as they should have been." 126 Cong. Rec. 11791 (1980).

Moreover, when the amendment was enacted in 1980, the courts of appeals were in conflict as to whether RICO applied to purely illegal enterprises such as the one in which petitioners were involved. Until this Court resolved the question in *United States* v. *Turkette,* 452 U.S. 576 (1981), the practical use of the RICO statute to prosecute marijuana traffickers was uncertain for reasons quite apart from the issue presented here. Finally, the 1980 amendment to Section 841 substantially increased the fine for large-scale marijuana offenses (from $15,000 to $125,000) to a level far in excess of the fine that could be imposed under RICO, and also provided for the cumulation of prison sentences in excess of RICO's maximum in the case of a series of marijuana violations. In these circumstances, Congress's decision in 1980 to increase the penalties for trafficking in more than 1,000 pounds of marijuana cannot be taken as any reflection upon the legislative intent ten years prior thereto regarding the propriety of including marijuana as a "dangerous drug" encompassed by RICO.

2. The RICO statute, 18 U.S.C. 1961(5), requires the government to prove that the defendant committed at least two "predicate acts" of racketeering activity. Petitioner Hobson alleges (84-1148 Pet. 12-15) that because both of the predicate offenses of which he was convicted arose out

of the same criminal transaction, *i.e.*, the Constellation episode, he did not engage in a "pattern" of racketeering activity as required by RICO. Hobson's attempt to limit RICO coverage to separate transactions finds no judicial support; indeed, every court that has considered Hobson's argument has rejected it. *E.g., United States* v. *Pepe,* 747 F.2d 632, 661-663 (11th Cir. 1984); *United States* v. *Phillips,* 664 F.2d 971, 1039 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982); *United States* v. *Weatherspoon,* 581 F.2d 595, 601-602 (7th Cir. 1978); *United States* v. *Parness,* 503 F.2d 430, 441-442 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975); *United States* v. *Salvitti,* 451 F. Supp. 195, 199-200 (E.D. Pa. 1978), aff'd, 588 F.2d 824 (3d Cir. 1978) (Table).

These decisions are supported by the plain language of the statute. RICO defines racketeering activity in terms of felonious offenses, not transactions. 18 U.S.C. 1961(1)(D). Hobson does not contend that he did not commit two separate felonies, and nothing in the statutory language requires that the two offenses constituting the RICO predicates be premised upon two separate and distinct criminal transactions. Moreover, nothing contained in Hobson's excerpt (84-1148 Pet. 13) of S. Rep. 91-617, 91st Cong., 1st Sess. 158 (1969), discussing the meaning of "pattern of racketeering activity," conflicts with the unanimous view of the courts that two criminal offenses may comprise the requisite pattern even though they are part of the same ongoing criminal episode. Accordingly, further review of this issue is not warranted.[4]

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[4]Hobson also argues (84-1148 Pet. 14) that the Department of Justice guidelines in effect at the time he was indicted proscribed the bringing of a RICO indictment based upon a pattern of racketeering activity growing out of a single criminal episode or transaction. As Hobson acknowledges, however, the guidelines do not confer any rights upon defendants. The preface to the Department's RICO guidelines always has provided that they are for internal guidance only and that they "are not intended to, do not, and may not be relied upon to create any rights,

3. a. Petitioner Waldrop contends that his RICO convictions were improperly premised on a single predicate act. In fact, three predicate acts supported Waldrop's conviction on the RICO counts—two offenses related to the Constellation episode and one related to the Tallahassee warehouse. Nevertheless, Waldrop argues (84-1164 Pet. 11-17) that his RICO convictions cannot stand because the Constellation episode was a separate endeavor of Cobb's that was wholly unrelated to the activities of the RICO enterprise. Waldrop contends that the district court failed to give the jury proper instructions on the concept of a RICO enterprise, thereby erroneously allowing the jury to consider the Constellation episode as enterprise-related.

The court of appeals correctly rejected Waldrop's attack on the jury instructions (Pet. App. 43-44). Contrary to Waldrop's contention (84-1164 Pet. 16 (emphasis added)), the instructions given by the district court did not permit the jury to conclude that "*any* criminal activity related to the importation of marijuana by any of the persons charged in the indictment" was sufficient "to link that defendant inescapably to a racketeering enterprise." On the contrary, the district court instructed the jury that the government had to prove beyond a reasonable doubt that "*the [predicate] offenses were connected with each other by some common scheme, plan or motive so as to constitute a pattern, and not merely a series of disconnected acts.*" Pet. App. 43 (emphasis in original).

In addition, as the court of appeals determined (Pet. App. 45), there was ample evidence to connect the Constellation episode with the marijuana trafficking RICO enterprise

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substantive or procedural, enforceable at law by any party in any matter civil or ciminal." U.S. Dep't of Justice, *United States Attorneys' Manual* § 9-110.200 (Mar. 1984). Furthermore, the guidelines do not place any limitations on otherwise lawful litigative prerogatives of the Department of Justice. *Ibid.*

even though some key members of the enterprise did not actively participate in that venture. Among those enterprise participants who did were Cobb, Hobson, Waldrop, co-defendants Manuel James, Clifford Wentworth, and John M. Araneo, and unindicted co-conspirators (and government witnesses) Carlton Reeves and James Sellers. Indeed, the only differences between the Constellation scheme and the other ventures of the enterprise were the use of an airplane instead of a vessel and the exclusion of Acosta, Bascaro, Villanueva, and another co-defendant, Gustavo Fernandez, from the initial planning and proposed sharing of profits. These distinctions did not make the Constellation episode a wholly distinct activity. The time frame coincided with the life of the enterprise, the goal was the same as that of the enterprise, the statute violated was the same as the one customarily violated by the enterprise, there was a continuity in the pattern of roles, and the geographical area was identical to that in which the enterprise otherwise operated. See *United States* v. *Lemm,* 680 F.2d 1193, 1199 (8th Cir. 1982), cert. denied, 459 U.S. 1110 (1983). The fact that Cobb, rather than Acosta, Bascaro, or Villanueva, orchestrated the venture and considered it separate from the enterprise's affairs did not necessarily make it so (see 84-1164 Pet. 14).

b. Waldrop also urges this Court to use his case as a vehicle to resolve an alleged conflict between the Eighth Circuit and other courts of appeals involving the manner in which the "enterprise" element in a RICO prosecution need be proved (84-1164 Pet. 18-26). The issue arose after *United States* v. *Turkette,* 452 U.S. 576 (1981), where this Court, in holding that RICO applies to wholly illegitimate as well as legitimate enterprises, stated (*id.* at 583) that the enterprise "is an entity separate and apart from the pattern of activity in which it engages." Relying on this language, the Eighth Circuit has held that a RICO enterprise must possess an ascertainable structure "distinct from that inherent in the

conduct of a pattern of racketeering." *United States* v. *Lemm,* 680 F.2d at 1198. See also *United States* v. *Bledsoe,* 674 F.2d 647, 665 (8th Cir. 1982); *United States* v. *Anderson,* 626 F.2d 1358, 1372 (8th Cir. 1980), cert. denied, 450 U.S. 912 (1981).

Other courts of appeals have rejected the Eighth Circuit's analysis of *Turkette. E.g., United States* v. *Mazzei,* 700 F.2d 85, 89 (2d Cir.), cert. denied, 461 U.S. 945 (1983); *United States* v. *Cagnina,* 697 F.2d 915, 921 (11th Cir.), cert. denied, 464 U.S. 856 (1983). While these decisions recognize (as did the court below (Pet. App. 43)) that *Turkette* requires the government to prove both the existence of an "enterprise" and a "pattern of racketeering activity," they also recognize that *Turkette* does not require separate and independent proof of the two elements. *E.g., Mazzei,* 700 F.2d at 89. Indeed, the Court expressly stated in *Turkette* that the proof used to establish the enterprise element "may in particular cases coalesce" with the proof offered to establish the pattern of racketeering activity. 452 U.S. at 583. Were this not the case, *Turkette*'s holding that an enterprise may include a group of individuals associated for wholly illegitimate purposes would be effectively negated. Thus, the enterprise element in a RICO prosecution may be proved, as it was in this case, by showing that an ongoing association of individuals who shared a common purpose acted together to commit a series of racketeering acts.

In any event, Waldrop has not demonstrated that the Eighth Circuit would have reversed his RICO convictions in this case. In *Lemm,* that court affirmed the RICO convictions of three defendants who participated in an insurance fraud scheme involving 17 arson fires. The court found (680 F.2d at 1201) that the government had established the existence of a RICO enterprise with a distinct, ascertainable structure because the proof showed not only that the

defendants had committed the predicate acts of mail fraud but also that they had engaged in "legitimate purchases and repairs of property."[5] Likewise here, the Eighth Circuit's requirement was satisfied because, in addition to the predicate acts of marijuana trafficking, the enterprise made legitimate purchases of farms and a fishing camp. Although the properties were used only to store marijuana for very brief periods, the enterprise did not immediately dispose of them after their usefulness as storage facilities had ended. Like *Lemm,* therefore, this case involved the use of the RICO statute as a weapon against "organized criminal activity" and not against a "sporadic and temporary criminal alliance to commit one of the enumerated RICO crimes" (680 F.2d at 1201). Because it is thus unlikely that the outcome of this prosecution turned on the jurisdiction in which it was brought, the case does not provide a proper vehicle for resolving a conflict among the circuits.

4. Petitioners Hobson and Waldrop claim (84-1148 Pet. 15-20; 84-1164 Pet. 26-28) that the court of appeals erred in upholding the validity of two amendments to a state wiretap authorization. The amendments were necessitated by the fact that Cobb, the target of the electronic surveillance, changed his telephone numbers after the issuing court had approved the initial wiretap application (Pet. App. 5, 11). In each of the two applications for authorization to amend the wiretap order to allow surveillance of the new telephone numbers, the affiant attached a copy of the original order, incorporated it by specific reference, and explained why it needed to be amended (*id.* at 11).

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[5]The defendants in *Lemm* purchased property to be burned. One of the defendants also "act[ed] as a private contractor and repair[ed] the fire damage in order to obtain a larger portion of the insurance proceeds." 680 F.2d at 1197.

Hobson and Waldrop argue that the Florida courts would not have approved the amendments because prior state court decisions have held that, when amendments are necessitated by a change of address during the authorized period of wiretapping, an application to amend must contain a full explanation as to why normal investigative techniques would be unworkable and may not simply incorporate a previous application by reference (84-1148 Pet. 18-20; 84-1164 Pet. 27). This claim was addressed in full by the court of appeals (Pet. App. 13-14). The court agreed that Florida law was controlling, but it rejected Hobson's and Waldrop's contention that the state courts would have disapproved the applications for amendments involved in this case. The court of appeals explained that the distinction between this case and the state intermediate appellate court decisions cited by Hobson and Waldrop lay in the fact that here only the telephone number, and not the residence, was changed and that such a change "could not conceivably have affected the efficacy of alternative investigative techniques." *Id.* at 14.

Petitioners' argument that the court of appeals misinterpreted Florida law by drawing a distinction between this case and the Florida decisions upon which they rely presents no substantial federal question.[6] In any event, it is

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[6]Hobson and Waldrop allege that the court of appeals should have certified the question to the Florida courts rather than answer it. Although certification was a possible course, it was not mandatory. Where, as here, the request to certify was not made until petitions for rehearing were filed, no issue of constitutional dimension was involved, the lawsuit already had been protracted, and the court of appeals obviously believed that it could resolve the issue with available research materials already at hand, its determination should not be disturbed simply because the certification procedure existed but was not used. *Lehman Brothers* v. *Schein*, 416 U.S. 386, 392-395 (1974) (Rehnquist, J., concurring); *Harman* v. *Forssenius*, 380 U.S. 528, 534-536 (1965); *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 328-329 (1964). If the rule were otherwise, federal courts could never resolve questions of state law without resort to available certification procedures.

adequately answered in the opinion of the court of appeals.[7] Moreover, nothing in the opinion below conflicts with *United States* v. *Smith,* 726 F.2d 852 (1st Cir. 1984) (en banc). Initially, we note that the court in *Smith* never discussed technical amendments such as those involved in this case; rather, the opinion dealt with the state law procedures for obtaining initial wiretap authorizations, renewals of those authorizations, and substantive amendments permitting the interception of calls involving persons other than those named in the initial authorizations.[8] In any event, the legal analysis employed by the court below is fully consistent with *Smith.* As here, the First Circuit in *Smith* looked to state law in upholding the validity of state wiretaps. The court concluded that the procedures employed by Massachusetts for authorizing applications and amendments violated neither federal law nor the state wiretap statute as

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[7]In a variation on the argument that the applications for the amendments did not comply with Florida law, Hobson also alleges (84-1148 Pet. 15-16) that the affiant, a state law enforcement officer, was not authorized to seek the amendments because the Florida wiretap statute allows only the Governor, the Attorney General, or a State Attorney to apply for a wiretap order. Hobson does not cite any authority for the proposition that simple amendments such as the ones involved here are encompassed within this statutory authorization requirement. Moreover, neither the federal nor the Florida statute contemplates that the high officials authorized to make applications for wiretaps must prepare each one personally and present it to the issuing judge. *Alexander* v. *Harris,* 595 F.2d 87, 89 (2d Cir. 1979); *United States* v. *Harvey,* 560 F. Supp. 1040, 1078 (S.D. Fla. 1982). Because none of the defendants raised this issue at trial, thereby in any event forfeiting their right to have it considered now (Fed. R. Crim. P. 12(b)), the record does not indicate whether the affiant had the permission of the State Attorney to seek the amendments.

[8]In an appendix to its opinion, the court in *Smith* listed all the applications, renewals, and amendments involved in the case (726 F.2d at 868). The appendix shows five initial applications, five renewals, and 14 amendments. Nearly all of the amendments were for the purpose of naming additional conversants. Only one amendment related to a change in telephone number, and the court's opinion nowhere discusses what procedures, if any, were required to obtain that amendment.

interpreted by the Supreme Judicial Court of Massachusetts.[9] Waldrop's allegation of a conflict between *Smith* and this case rests upon the erroneous premise that the court below confined its analysis to a "cursory treatment of Florida law" and "disregard[ed]" the fact that Florida law governed the validity of the applications (84-1164 Pet. 28). The opinion below demonstrates that the court did no such thing.

5. Petitioner Hobson argued in the court below (Pet. App. 35-39) that the evidence was insufficient to sustain his conviction on any of the six counts on which he was convicted. In this Court, he contends (84-1148 Pet. 21-27) that factual misrepresentations in the government's brief deprived him of due process of law because the court of appeals, in rejecting his sufficiency argument, "apparently chose to rely on the government's assertions" in its brief (*id.* at 24-25). This claim lacks merit.

At the outset, we acknowledge that the government's 154-page brief in the court of appeals contained one clear factual error. See page 22, *infra.* Moreover, we agree with Hobson that, upon discovery of this inadvertent mistake, the better course would have been for the government to advise the court of appeals of the error by letter or other supplemental pleading.[10] As for the other "misrepresentations" that Hobson attributes to the government (see pages

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[9]The fact that the First Circuit in *Smith* looked to an opinion of the Supreme Judicial Court of Massachusetts for guidance in interpreting the state wiretap statute does not demonstrate the existence of a conflict. The Massachusetts state court opinion was directly on point, whereas there are no controlling decisions of the Florida Supreme Court. As we have already shown, however, the absence of definitive state court precedent in Florida did not preclude the court of appeals from resolving the state law issue itself (see note 6, *supra*).

[10]While we agree with Hobson that the government should have corrected the error in its brief, we take issue with his assertion (84-1148 Pet. 25) that the error was other than inadvertent. The record in this

22-23, *infra*), our review of the record convinces us that the most that can be said is that the government's brief may have summarized the evidence against Hobson with less than complete precision. In fact, however, it appears to us that the "errors" alleged by Hobson—with the one exception noted—actually amount to nothing more than aggressive advocacy that Hobson has chosen, with equal or greater aggressiveness, to characterize as "horrendous misstatement[s]" (84-1148 Pet. 22). In any event, it is clear, as we demonstrate below, that Hobson could not have suffered any prejudice regardless of how one characterizes the government's brief and that the record evidence amply supports his convictions.

Contrary to the entire premise of Hobson's argument, the court of appeals' opinion shows that it did not simply adopt the factual assertions in the government's brief. In uncommon fashion, the opinion below contains its own record citations for the facts relied upon by the court in rejecting Hobson's sufficiency claim (Pet. App. 35-36). The inclusion of these references demonstrates that the court did not ignore the contentions made in Hobson's reply brief and at oral argument that there were misstatements in the government's brief. Accordingly, there is no basis for concluding that the court below abdicated its duty to make an independent examination of the record in light of the contentions advanced by the parties.

More importantly, the facts recited by the court of appeals (Pet. App. 35-36) are supported by the record. The record shows that petitioners Hobson and Waldrop were partners (36 R. 141-143; 40 R. 55); that Waldrop was one of

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multi-defendant case is massive, and the facts pertaining to each individual defendant are scattered throughout that record. In these circumstances, inadvertent errors, while regrettable, are certainly understandable.

the "best buyers" that the marijuana enterprise had (40 R. 55); and that Hobson and Waldrop dealt with the enterprise's accountant in connection with marijuana transactions on 25 or 30 occasions (40 R. 61-62). The record also shows that Waldrop, acting with Hobson and another individual, made a $1,500,000 advance payment for a shipment of marijuana by airplane; that Hobson subsequently told co-conspirator Bill Cobb that Cobb should either return the money or deliver the marijuana (38 R. 186-187, 220-223; 40 R. 54-55; GX 126); and that trucks furnished by Waldrop and Hobson came to the clandestine landing site in Florida where the Constellation was scheduled to arrive (39 R. 10-12). The record also shows the presence of both Hobson and Waldrop at various of the organization's stash houses. Specifically, both acquired marijuana at the Cottondale farm (38 R. 154); Waldrop stacked some of the marijuana at the Tallahassee warehouse (40 R. 53); and Hobson came to the farm in Madison County in an 18-wheel truck in order to acquire 25,000 pounds of marijuana (36 R. 142; 40 R. 55).

These facts from the record fully support the court of appeals' conclusion that, "[i]n light of the massive quantities of marijuana involved, the frequency with which Waldrop and Hobson had occasion to deal with the other members of the enterprise, the fact that Hobson, Waldrop and Cobb were described as the principal organizers of the Constellation episode * * *, and the presence of both Hobson and Waldrop at various of the organization's stash houses on numerous occasions" (Pet. App. 39), the jury was warranted in finding that Hobson knew the marijuana was imported. See *United States* v. *Corbin,* 734 F.2d 643, 652-653 (11th Cir. 1984). See also *Turner* v. *United States,* 396 U.S. 398, 416 n.29 (1970). These facts also support the court of appeals' conclusion that Hobson and Waldrop were more than "mere purchasers" and that the evidence was more than sufficient to show that they joined a conspiracy with the other co-defendants (Pet. App. 38).

Nor is it plausible to contend that the court of appeals' rejection of Hobson's sufficiency claim could have been premised upon government-induced inaccuracies. The statement of facts in the government's brief consisted of 31 pages with appropriate record references, and Hobson does not claim that there were any errors in that lengthy statement. Rather, his claim is directed to statements on pages 137 and 139 of the government's brief, made in response to Hobson's argument that the evidence was insufficient to sustain his convictions on Counts 3 and 4.

On page 139 of the government's brief, the government erroneously stated that Count 4 related to the *Tanila* boatload. We acknowledge that Count 4 charged Hobson with importing marijuana aboard the Constellation aircraft rather than the *Tanila*. But the court of appeals recognized this obvious mistake and placed no reliance on it; the court's opinion correctly states that "Hobson and Waldrop's convictions arose out of their involvement in two smuggling ventures: the 'Tallahassee warehouse' and 'Constellation' episodes" (Pet. App. 35). What Hobson characterizes as a "false statement, pure and simple" (84-1148 Pet. 24) thus played no role whatsoever in the affirmance of his conviction on Count 4.

Hobson also challenges (84-1148 Pet. 22) the government's characterization of the evidence to support his conviction on Count 3 (conspiracy to import marijuana) by attacking certain statements made on page 137 of the government's brief. There, referring to the various marijuana storage sites used by the enterprise, the government stated that "middlemen such as Hobson and Waldrop stood by awaiting the completion of the counting and weighing, after which they immediately removed sizable portions of the massive loads" (*ibid.*). The brief continued by stating, with reference to Hobson and Waldrop, that "[t]hey were not mere customers. Their constant readiness to take charge of large quantities of marijuana at whichever storage site

they had been directed to demonstrates that they played a substantial role in the importation activities" (*id.* at 137-138 (footnote omitted)).[11]

Hobson apparently objects to the representations that he and Waldrop were "standing by" and that they were "constantly ready" to purchase large quantities of marijuana (84-1148 Pet. 22). Hobson's objections on this score amount to little more than semantic quibbles. A more precise argument demonstrating that Hobson and Waldrop were not just mere customers and that they were ready to buy large quantities of marijuana would have noted that both of them visited the organization's stash houses, that Waldrop had stacked marijuana at the Tallahassee warehouse where

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[11]The full paragraphs from which petitioner quotes read as follows (Appellee Br. 137-138 (citations and footnote omitted)):

> In this case the government proved that conspirators other than Waldrop and Hobson brought marijuana from outside the United States to various locations in Florida and Georgia. The importation venture did not end at the shore, since the marijuana was immediately destined for an internal location. The internal destination points were storage sites such as different farms or a warehouse in Tallahassee. There, middlemen such as Hobson and Waldrop stood by awaiting the completion of the counting and weighing, after which they immediately removed sizable portions of the massive loads.
>
> From the evidence of presence at the storage sites at a delivery time the jury could fairly conclude that Waldrop and Hobson were trusted members of the enterprise and that they knew of the delivery plans in advance. From the frequency of their involvement the jury also could infer that Waldrop and Hobson knew of the scope of the delivery activity. They were not mere customers. Their constant readiness to take charge of large quantities of marijuana at whichever storage site they had been directed to demonstrates that they played a substantial role in the importation activities by providing assurances that the importation would be successful and by minimizing the risk of loss to the importers, a risk that increased with each moment that the marijuana remained in storage. In fact, on one occasion they paid $1,500,000 in advance for a part of the Constellation load.

40,000 pounds had been set aside for him, and that Hobson had picked up 25,000 pounds in a huge truck. See pages 4-6, *supra*. That they were not mere customers is further demonstrated by their advance payment of $1,500,000 for marijuana, an action that clearly facilitated the importation of marijuana in the Constellation aircraft.[12]

In short, there is no reason to remand the sufficiency question "for reconsideration in light of an accurate statement of facts" (84-1148 Pet. 27).

6. Petitioner Hobson claims (84-1148 Pet. 27-29) that government misrepresentations caused the district court to disqualify his original counsel, thereby depriving him of representation by counsel of his choice. Because Hobson failed to raise this issue in the court of appeals, it should not be considered by this Court. See, *e.g., United States* v. *Lovasco,* 431 U.S. 783, 788 n.7 (1977). In any event, nothing in the record supports a claim of prosecutorial misrepresentation that caused the trial judge to be "misled" (84-1148 Pet. 28) when he issued a pretrial order disqualifying Hobson's first counsel based on the fact that the testimony of two government witnesses might have implicated that lawyer in the marijuana trafficking scheme. The decision to disqualify the lawyer was premised upon sworn affidavits of the two witnesses. Hobson unsuccessfully challenged the disqualification order prior to trial. *United States* v. *Hobson,* 672 F.2d 825 (11th Cir.), cert. denied, 459 U.S. 906 (1982). The court of appeals' opinion in that case sets forth the facts contained in the witnesses' affidavits (672 F.2d at 826); those facts leave no room to doubt the correctness of the district court's ruling. The lawyer's alleged involvement in the drug trafficking scheme was substantial, and his

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[12]Hobson's claim (84-1148 Pet. 23) that he had no knowledge of "specific delivery plans" is refuted by the trucks he and Waldrop brought to the planned landing site of the Constellation (39 R. 10-12).

representation of Hobson was frought with the potential for a serious conflict of interest. The fact that the witnesses ultimately presented their testimony without referring to the misconduct of the disqualified lawyer did not belie the allegations contained in their affidavits. Moreover, filing the motion to disqualify Hobson's original counsel was the only prudent action available to the government prior to trial since it could not know for certain whether the testimony would prove necessary or, even if not necessary, might come out at trial inadvertently. The fact that neither event occurred has no bearing on the propriety of the government's motion when filed or the district court's ruling when made.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respecfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

RUSSELL HOBSON III,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF ON CERTIORARI

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Petitioner asked this Court to grant his petition to consider whether, under *United States v. Agurs*, the government denies a defendant due process when it refuses to correct plain misstatements of fact specifically brought to its attention in the appellate process and that have created a misapprehension in the court of appeals as to the record.

The government has conceded that it made one absolutely incorrect argument to the court of appeals and failed to correct it, even after petitioner had identified the error (Gov. Br. at 19.) The government argues, however, that the error was harmless (*id.* at 22.) The Brief in Opposition sweeps the other factual errors into a single euphemism: "The most that can be said is that the government's brief may have summarized the evidence against Hobson with less than complete precision" (*id.* at 20.)

The government substitutes this euphemism for a forthright presentation of the imprecision it concedes.

It declines to identify the imprecise statements made to the court of appeals and asks the Court to accept its conclusory statements concerning the effect of the errors rather than candidly setting them forth so that the Court may make its own judgment.

Petitioner asks this Court to examine a very short table set forth below. It demonstrates, accurately and completely, that the life blood of this case flows behind the government's euphemism. Petitioner asks only that this Court, not the government, examine the corrections that the government has made. The entire point of petitioner's argument is that the government, along with defense counsel, owes an obligation to appellate courts to help them review a lengthy record, and has no special right to misstate the record, fail to correct errors, or conceal corrections in a single euphemistic expression that hides their demonstrable significance.

The chart that follows compares the arguments made in the government's appellate brief, the factual statements of the court of appeals, and the corrected factual statement made (implicitly and definitely) in the Brief in Opposition:

Government's Brief Court of Appeals	Court of Appeals' Opinion	Brief in Opposition in this Court
Hobson stood by while marijuana was weighed and counted and he immediately removed his load (p. 137)	He was in stash houses on numerous occasions (App. 39)	Implicit concession —Hobson never stood by while marijuana was weighed and counted (p. 23)[1]
Hobson was constantly ready to take large loads (pp. 137-38)	Hobson frequently purchased marijuana from the enterprise (App. 39)	Implicit concession —no evidence that Hobson stood ready to purchase (p. 23); in fact, he purchased at most twice[2]
Hobson had 25-30 dealings with the enterprise (p. 137)	Hobson purchased marijuana on 25-30 occasions from the enterprise (App. 38)	Hobson purchased at most twice; he dealt with the accountant, not to purchase marijuana, on 25-30 occasions (p. 21)[3]
Two airplane ventures should be considered together (pp. 29-31)	Hobson was involved with two related airplane ventures (App. 36, 47)	Hobson had nothing to do with the first airplane venture (p. 7)[4]

[1] This error affected four of the six counts against Hobson: the two RICO counts (1, 2), the conspiracy to import marijuana (3), and the conspiracy to possess marijuana with intent to distribute (5). The only basis for the court of appeals' finding of Hobson's knowledge of importation was the erroneous assumption concerning his presence while marijuana was brought to warehouses, weighed and stored.

[2] The trial evidence clearly showed that Hobson purchased marijuana twice at most prior to his downpayment on an additional quantity which he never received and which is the subject of counts 4 and 10. The Brief in Opposition (page 3) now concedes that Abbey kept detailed records of purchases (page 6). Abbey testified for the

(footnote continued on next page)

This Court need not speculate as to the importance of the court of appeals' misapprehensions of facts. That court stated explicitly that it found sufficient evidence that petitioner knew of importation because of his frequent dealings with the enterprise and his presence at locations where the marijuana was counted and weighed (App. 39)—facts that the government now concedes are false. The court of appeals indicated that it would not have affirmed petitioner's conviction for conspiracy to possess marijuana with intent to distribute if he had been a purchaser only occasionally (App. 38)—but it was misled into believing that there were 25-30 purchases rather than simply one or two. And the court of appeals emphasized that it believed petitioner was involved in two airplane ventures, which it found critical to its analysis of the charges generally and particularly to its conclusion that petitioner had aided and abetted the "Constellation" venture (App. 36, 47)—while the government now concedes that petitioner had nothing whatever to do with the first airplane incident.

(footnote continued from preceding page)

government that there were approximately ten loads of marijuana in all (40 R. 49-50) and that Hobson bought only once (34 R. 140-44). Cobb, the leading government witness, testified that Hobson purchased twice (38 R. 154, 158, 164). There was no testimony that Hobson was a regular purchaser or that he stood ready to purchase. This mistake affected the court of appeals' consideration of all counts except 4 and 10.

[3] The court of appeals, which relied upon its misapprehension that Hobson had purchased 25 or 30 times, was confused by this mistake on all counts except 4 and 10.

[4] The court of appeals' erroneous assumption that Hobson was involved with the first airplane venture (the DC-3 seized in January, 1979 at Fort Lauderdale) was the sole basis for its conclusion that Hobson had aided and abetted the importation and possession of marijuana on the Constellation (counts 4 and 10).

The government has conceded error before and asked this Court to accept its representation that the error was harmless. *See, e.g., Moore v. United States*, 429 U.S. 20, 22 (1976) (Solicitor General conceded hearsay error but asked Court to call it harmless; Court remanded instead). Now, the government wants to do more; it concedes error softly and quietly and offers a single euphemism instead of a candid recitation of its "imprecise" statements in the court of appeals. It asks that this Court permit it, rather than the federal judiciary, to decide whether its mistakes which produced such serious factual errors in the court of appeals were harmless. But review is a judicial function, not an executive one.

Petitioner believes, as do the amici National Association of Criminal Defense Lawyers and the National Legal Aid and Defenders Association, that it is vital to the integrity of the federal judiciary and to fundamental notions of due process that any litigant be required to correct errors made in legal papers filed with federal courts when the errors have been specifically called to the litigant's attention and there is time to respond. The government indicates that this is a good idea, but apparently it is unwilling to say that it should be required (Gov. Br. at 19-20 n.10.). Like the national organizations that watch this case with great anticipation, petitioner wishes this Court would announce as a rule the duty to correct identified errors in a timely fashion. Such an announcement would work toward assuring accurate and fair decisions at every level of the judiciary.

II. MARIJUANA IS NOT WITHIN THE COVERAGE OF RICO.

Whether RICO includes marijuana offenses is unquestionably an issue of major importance. Yet, the government's response seeks to have this Court deny certiorari solely on the basis of its earlier denial in *Gustafson v. United States*, 105

S.Ct. 957 (1985).[5] But there are critical differences between the petitions in *Gustafson* and the instant cases.

Unlike Gustafson's petition, the application in No. 84-1403 contains an exhaustive analysis of the legislative history of RICO. Yet the government, having received three unopposed extensions of time, finds no contrary authority.

Unlike the petition in *Gustafson*, the author of the very bill which is under consideration is of counsel in No. 84-1148. Professor Blakey, the principal author of the federal wiretap statute which explicitly covers marijuana, and the principal author of RICO which contains identical language to Title III except for the omission of marijuana, has repeated his long-held understanding that it was not the intent of Congress to include marijuana within RICO's coverage (No. 84-1148 Pet. at 8-9 & n.7). Yet the government ignores Blakey's statements.

Rather than respond to the legislative history or to Blakey's appearance of counsel, the government argues that this Court would be justified in extending RICO to marijuana offenses because RICO should be liberally construed (Gov. Br. at 10). Such an argument is an invitation to lawlessness. If Congress removed marijuana from the coverage of RICO, no court, not even this one, would be warranted in adding it. Such a "construction" would remove principled limits from statutory interpretation.

Petitioner submits that judicial economy will be well served if this Court reviews the RICO issue now. The government, on the strength of the Eleventh Circuit opinion, will continue to prosecute RICO offenses involving

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[5] The only new government argument asserts that RICO was not applied to marijuana cases prior to *Turkette* because of the uncertainty whether RICO reached wholly unlawful activity (Gov. Br. at 11). The weakness of this argument is demonstrated by the fact that no court, before or after *Turkette*, dismissed a RICO/marijuana case on the theory that marijuana transactions were wholly unlawful.

marijuana, and defendants will continue to challenge RICO's application to marijuana. The same legislative history cited to this Court will be cited to the lower courts. They will be compelled to make the same statutory analysis that this Court would make if it granted review. Surely, an issue of this importance is better reviewed sooner rather than later.

III. TWO OFFENSES ARISING FROM THE SAME ACT CANNOT CONSTITUTE A PATTERN OF RACKETEERING ACTIVITY.

In his petition, Hobson argued that the court of appeals had seriously misconstrued the RICO statutes when it found a pattern of racketeering activity from a single act. The court of appeals believed that since petitioner's single act, the attempted purchase of a load of marijuana, had given rise to two felonies, importation and possession with intent to distribute, the pattern requirement of 18 U.S.C. § 1961(5) had been satisfied (App. 39-40).

The government, as did the Eleventh Circuit, characterizes petitioner's argument as asserting a "one transaction" theory—a theory which petitioner expressly disavowed and which has been repeatedly rejected by the lower courts. In no case has a racketeering pattern been created from the commission of a single act. Petitioner's single attempt to purchase marijuana, unlike the multiple acts involved in every case cited by the government and the Eleventh Circuit, does not come within the "pattern" definition provided by this Court in *United States v. Turkette*, 452 U.S. 576, 583 (1981): "[A] pattern of racketeering activity is . . . a *series of criminal acts* as defined by the statute" (emphasis added). It is almost tautological to note that a series of criminal acts is not a single act, regardless of how many felonies may be charged from it.

RICO cases have mushroomed in the civil and criminal courts of this country. Each of these necessarily involves compliance with the pattern requirement of 18 U.S.C. § 1961(5). This Court will not have a better case in which to

clarify the racketeering pattern definition. There is no dispute that the only predicate act upon which petitioner's RICO convictions were based is his attempted purchase of marijuana (App. at 39-40 n.14).

Nor is there any dispute that under appropriate circumstances a single act may lead to multiple charges (No. 84-1148 Pet. at 14). The discrete legal issue clearly presented is whether the RICO pattern requirement is satisfied by one act when it leads to more than one felony charge. Certiorari should be granted to resolve this important federal question.

IV. THE WIRETAPS WERE UNLAWFUL.

A. Applications To Amend Wiretap Orders Must Be Submitted By Authorized Persons.

The Brief in Opposition makes three responses: (1) this issue was not raised at trial; (2) the case law allows applications by police officers; and (3) there is no authority for the proposition that amendment applications are to be treated as original applications (Gov. Br. at 18 n.7). The government is manifestly wrong in each response.

The lack of authorization was raised in a pretrial motion to suppress (3 R. 491) joined by all defendants (4 R. 798; 8 R. 1925). The motion expressly asserted that the person making the applications was not properly authorized and that the amendment applications were incorrectly submitted (3 R. 507-10).

The case law submitted by the government approving applications by police officers is embarrassingly inapposite. In both *Alexander v. Harris*, 595 F.2d 87, 89 (2d Cir. 1979), and *United States v. Harvey*, 560 F. Supp. 1040, 1078 (S.D. Fla. 1982), the officers had written authorization from the principal prosecuting attorneys. In petitioner's case, no such authorization existed.

Last, an opinion of the First Circuit is clear authority that the principal prosecuting attorney is required to authorize amendment applications. In *United States v. Smith*, 726 F.2d

852 (1st Cir. 1984) (en banc), the court analyzed amendment applications, including one to change a telephone number, 726 F.2d at 868, in precisely the same fashion that it analyzed original and renewal applications. It did not approve a lesser standard for amendment applications.

Thus, the Eleventh Circuit has placed itself in conflict with the First Circuit.

B. Applications To Amend Wiretap Orders Must State Probable Cause For The New Order.

The government claims that Hobson requires certification to state courts whenever any issue of state law arises (Gov. Br. at 17 n.6). In fact, Hobson argues that where there is no clear and controlling state precedent on a dispositive constitutional issue, and where state courts have a well-established mechanism promoting certification,[6] the failure to certify is so serious a departure from the accepted and usual course of judicial proceedings as to require a supervisory grant of certiorari.

The government has also suggested that petitioner raised this issue too late (*id.*). Had petitioner known that the Eleventh Circuit would interpret Florida law contrary to the only interpretation offered by the parties, he would of course have earlier suggested certification. This absence of parties' dispute on Florida law distinguishes this case from *Lehman Brothers* v. *Schein*, 416 U.S. 386, 392-95 (1974) (Rehnquist, J., concurring).

V. DISQUALIFICATION OF PETITIONER'S TRIAL COUNSEL REQUIRES A NEW TRIAL.

The government does not respond to the merits on this issue; instead, it claims that (1) petitioner failed to raise this issue in the court of appeals, and (2) the trial court found that counsel had a conflict of interest (Gov. Br. at 24). The record contradicts both claims.

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[6] *See* Fla. Stat. § 25.031 (1983); Fla. R. App. P. 9.150 (1980).

The issue was raised in petitioner's brief in the court of appeals (*see* Brief of Appellant Hobson at 41 & n.29) and in his Suggestion for En Banc Consideration of the Issue of Disqualification of Counsel, filed concurrently with his appellate brief (Reply App. 1-15).

In its written order disqualifying counsel, the trial court never stated that it was finding facts; instead, it carefully limited its concern to the effects of the testimony the government represented it would elicit: "Once testimony about Taylor's involvement came before the jury, its members could not help but wonder if the lawyer is protecting himself or his client" (8 R 1889-90). The court disqualified counsel based upon the government's misrepresentations of the testimony it would adduce.

In the trial court, the government successfully misled the judge and secured disqualification of petitioner's counsel. In the appellate court on pretrial appeal, the government successfully convinced the Eleventh Circuit that such testimony would require disqualification. In this Court, the government claims that the issue was not raised on post-trial appeal in the Eleventh Circuit and that the trial judge was not misled by the government. Petitioner prays that this most recent government effort will not be successful.

Respectfully submitted,
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APPENDIX

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. **RUSSELL HOBSON, et al.,** *Defendants-Appellants.*	On appeal from the United States District Court for the Northern District of Florida. **No. PCR 81-440** Honorable **Lynn C. Higby,** Judge Presiding

HOBSON'S SUGGESTION FOR EN BANC CONSIDERATION OF THE ISSUE OF DISQUALIFICATION OF COUNSEL

STATEMENT OF THE ISSUES

Is a defendant entitled to a due process hearing when a prosecutor moves to disqualify defense counsel for the "appearance of impropriety?" Does a defendant have a Sixth Amendment right to challenge the truthfulness and trustworthiness of the prosecutor's assertions upon which the court is asked to rely? What burden must the movant meet to be entitled to an order disqualifying opposing counsel?

The panel impliedly answered the first two questions "no." It did not address the third issue.

STATEMENT OF PROCEEDINGS

Hobson was convicted by a jury in *United States* v. *Villanueva*, No. PCR 81-440 (N.D. Fla. 1982) (hereinafter "Sunburn I"), on six counts relating to illegal importation and distribution of marihuana. His appeal from judgment of conviction is now pending before this Court.[1]

Prior to the Sunburn I trial, the court granted the government's motion to disqualify Hobson's trial counsel. The order was affirmed by this Court in *United States* v. *Hobson*, 672 F.2d 825 (11th Cir.), *cert. denied*, 103 S.Ct. 208 (1982).

This Suggestion for En Banc Consideration has been filed pursuant to Fed. R. App. P. 35(b) and 11th Cir. R. 26. Because it suggests that an appeal be heard initially en banc, it is filed prior to submission of the appellee's brief. Fed. R. App. P. 35(c).

STATEMENT OF FACTS

Two months prior to the Sunburn I trial, the court held a hearing on the government's motion to disqualify Hobson's counsel, Clyde M. Taylor. During a lengthy colloquy with Hobson, the trial court identified specific problems that might result if Taylor were to continue to represent Hobson. The judge included the possibility that the jury might infer Hobson's guilt from the potential testimony of two witnesses, Robinson and Alexander, who implicated Taylor in criminal

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[1] Hobson's brief in support of his appeal from judgment of conviction is being filed on the same date as this Suggestion for En Banc Consideration.

conduct, claiming that he knew they had discussed unloading marihuana (4th Supp. at 31–33).[2] The trial court advised Hobson that Taylor's continued representation would not be in Hobson's best interest (*id.* at 33). Despite these warnings, Hobson repeatedly acknowledged his understanding of the potential conflicts and expressed his desire to be represented by Taylor (*id.* at 31, 32, 33, 34).

Ruling from the bench, the court disqualified Taylor (*id.* at 27, 34). In a written order the court stated that the allegation that Taylor knew of illegal marihuana importation, if true, created an appearance of impropriety in violation of Canon 9 of Florida's Code of Professional Responsibility (Vol. 8 at 1887).[3] The court refused to accept Hobson's waiver of prejudice (*id.* at 1890).

The district court's decision was affirmed by a divided panel in *United States* v. *Hobson*, 672 F.2d 825, which noted that the disqualification order was "based factually upon affidavits of two witnesses, Robinson and Alexander, whom the government represents will testify in Hobson's upcoming trial." 672 F.2d at 826.

According to affidavits the government procured from Robinson and Alexander, they had been in Taylor's office and had discussed the possibility that Robinson could participate in off-loading marihuana. These discussions took

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[2]The Record on Appeal is cited in this Suggestion as "Vol. __ at __ " or "__ Supp. at __ ." Transcripts not contained in the record are referred to as "Tr."

[3]Rule 5(F) of the United States District Court for the Northern District of Florida adopts the Florida Code of Professional Responsibility. *See also Norton* v. *Tallahassee Memorial Hosp.*, 689 F.2d 938, 940 n.3 (11th Cir. 1982).

place while Taylor was in and out of the office. (The text of the affidavits is set forth in Exhibits A and B, herein.)

The panel noted, "it is reasonable to expect that [Robinson and Alexander] will testify as to the same allegations made in their affidavits." 672 F.2d at 828. Upon this assumption, the panel concluded that such testimony in a trial in which Taylor represented Hobson could erode public confidence in the integrity of the bar and the legal system. It further held that Canon 9 was designed to prevent such erosion and affirmed the order disqualifying Taylor. *Id.* at 829.[4]

Robinson and Alexander were called as government witnesses at Hobson's trial but on direct examination neither testified to the alleged off-loading discussions in Taylor's office. The only testimony concerning that matter was elicited on cross-examination by defendant James' attorney, who questioned Robinson about the incident to lay a foundation for impeachment by prior false testimony (Vol. 31 at 186–190).[5]

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[4] Hobson respectfully asserts *infra*, that the Sixth Amendment gives him the right to challenge the reasonableness of this expectation and the truth and admissibility of the expected testimony upon which the court would rely to deprive him of his lawyer.

[5] In his grand jury testimony, Robinson's version of the off-loading discussion placed him and Alexander in one room and Taylor in another (Vol. 31 at 188-189). He did not testify that Taylor went in and out of the room used by Alexander and Robinson, nor that Taylor could have heard their discussion.

ARGUMENT

A DEFENDANT IN A CRIMINAL CASE IS ENTITLED TO A HEARING ON THE TRUSTWORTHINESS OF THE FACTS UPON WHICH A COURT IS ASKED TO RELY WHEN THE PROSECUTOR SEEKS TO DISQUALIFY DEFENSE COUNSEL BECAUSE OF AN APPEARANCE OF IMPROPRIETY.

Robinson and Alexander testified at Hobson's trial but were never asked by the government about discussions of marihuana activities in Clyde Taylor's office. This casts serious doubt on the government's good faith in bringing the motion to disqualify Taylor. Evidence raising an appearance of impropriety which the government implied would be presented at Hobson's trial was not and Hobson went to trial without Taylor.[6]

Defendants in criminal cases will continue to go to trial without their chosen advocates so long as the panel decision in *Hobson* remains the law of this Circuit. The panel decision allows the government to manipulate a defendant's choice of counsel whenever it has potential witnesses who will execute an appropriate affidavit. This Court's comment that attorneys "now commonly use disqualification motions for purely strategic purposes," *Woods* v. *Covington Cty. Bank*, 537 F.2d 804, 813 (5th Cir. 1976), illuminates the government's conduct in this case. The government, like this Court, recognizes that a defendant "is delayed or otherwise disadvantaged by the unnecessary disqualification of his lawyer under the appearance of impropriety doctrine." *Id.* Prosecutors will remain free to manipulate defendants'

[6] It is reasonable to question whether there was ever a need for the testimony or if, instead, it simply provided a handy vehicle to eliminate experienced counsel.

choice of counsel unless this Court, *en banc*, changes its apparent position on disqualification motions filed by the government.

In *United States* v. *Snyder*, 707 F.2d 139 (5th Cir. 1983), the Court stated that disqualification may be on one of two grounds: conflict of interest or integrity of the judicial system. 707 F.2d at 145. Neither is absolute: some conflicts may be waived by clients, *see United States* v. *White*, 706 F.2d 506 (5th Cir. 1983), and in some cases the defendant's interest in counsel of choice may outweigh a more limited public interest in maintaining the appearance of integrity of the judicial process. *Cf. Snyder*, 707 F.2d at 145 n.5.

When the "integrity of the system" basis is invoked, a two-pronged test is to be used: first, although there need not be proof of actual wrongdoing, "there must be at least a reasonable possibility that some specifically identifiable impropriety did in fact occur." *Woods*, 537 F.2d at 813. Second, "a court must also find that the likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer's continued participation in a particular case." *Id.* at 813 n.12. Under Canon 9, an attorney may be disqualified only when both of these criteria have been met. *Id.*

The *Woods* test is adequate; it is in the application of this two-pronged test that the Sixth Amendment requires a different approach. The "reasonable possibility" standard for the existence of impropriety is overly permissive when disqualification motions are made in criminal cases. Because the "interest in permitting a criminal defendant to retain counsel of his choice is strong and deserves great respect," *Hobson*, 672 F.2d at 828; *see also Snyder*, 707 F.2d at 145 n.5, a

due process hearing should be held before a trial court grants a government motion to disqualify defense counsel.

An adversary hearing should precede findings concerning either prong of the *Woods* test and should follow a procedure common to other motions *in limine*: the prosecutor announces his intention to introduce at trial evidence pertinent to disqualification; the defense objects either if it is disputed or if it is claimed to be irrelevant or otherwise inadmissible; and the trial judge resolves the dispute. If the evidence is not admissible, the inquiry may end. If the evidence is admissible, a hearing can be held to test the trustworthiness of the evidence which the government claims to possess. The court would be required to find substantial evidence[7] that a "specifically identifiable impropriety did in fact occur." *Woods*, 537 F.2d at 813.

This procedure reasonably accommodates the sometimes conflicting values of the defendant's fundamental right to counsel of choice and the court's obligations to guard against conflicts of interest and to protect the integrity of the judicial system.

It should be noted that, the government never represented that it would present at trial the testimony of Robinson and Alexander on the Taylor allegations (Vol. 5 at 1189). The

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[7]Similar procedures are presently required when other Sixth Amendment rights are implicated by the government's proposed evidence. *See, e.g., United States* v. *James*, 590 F.2d 575 (5th Cir.) (*en banc*), *cert. denied*, 442 U.S. 917 (1979).

district court assumed it would be presented,[8] and this Court followed suit.[9]

On a motion to disqualify Taylor from representing a defendant in *United States* v. *Acosta*, No. MCR 82-220 (N.D. Fla. 1982) ("Sunburn II"), the same trial judge noted the absence of the predicted testimony from the Sunburn I trial and recognized, albeit too late for Hobson, that the testimony would have been inadmissible during the government's case:

> THE COURT: Well, that's what I'm wondering. In the last case Robinson and Alexander were witnesses and did testify. They did not testify anything concerning the discussion they had, alleged to have been had with Taylor in his office. It was really irrelevant. [sic][10]

(Sunburn II Tr. of Oct. 7, 1982, Vol. II at 5.)[11]

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[8] The district court stated: "Once testimony about Taylor's involvement came before the jury its members could not help but wonder if the lawyer is protecting himself or his client" (Vol. 8 at 1889-90).

[9] This Court stated: "[I]t is reasonable to expect that [witnesses Robinson and Alexander] will testify as to the same allegations made in their affidavits. This testimony will portray Hobson's attorney . . . and . . . will impugn severely his integrity and credibility in the eyes of the jury." 672 F.2d at 828.

[10] In the instant case Taylor had argued lack of relevance in his Response to Motion to Disqualify Counsel. (Vol. 8 at 1851.)

[11] The government's motion to disqualify Taylor in Sunburn II was denied (Sunburn II Tr. of Oct. 7, 1982, Vol. II at 29). This Court may take judicial notice of the Sunburn II transcript pursuant to Fed. R. Evid. 201 because it is a part of the record of proceedings in a closely related case in an inferior court. *ITT Rayonier Inc.* v. *United States*, 651 F.2d 343, 345 n.2 (5th Cir.

(footnote continued on next page)

In assuming that the testimony of Robinson and Alexander concerning Taylor would be presented to the jury, both the trial court and this Court made at least passing reference to the weaknesses of the assumed testimony.[12] These weaknesses went directly to the heart of the prong of the disqualification test that requires a prediction of public suspicion or obloquy. [13]

(footnote continued from preceding page)

1981) (Unit B); *Rodic* v. *Thistledown Racing Club, Inc.*, 615 F.2d 736, 738 (6th Cir.), *cert. denied*, 449 U.S. 996 (1980); *St. Louis Baptist Temple* v. *F.D.I.C.*, 605 F.2d 1169, 1172 (10th Cir. 1979); *Kinnett Dairies, Inc.* v. *Farrow*, 580 F.2d 1260, 1277 n.33 (5th Cir. 1978).

[12] The district court stated: "They are only affidavits and not conclusive. Both are statements of convicted felons. And Robinson's contradicts his Grand Jury testimony" (Vol. 8 at 1888-89). This Court stated: "Even though the [affidavits'] allegations may be false" 672 F.2d at 828.

[13] The majority's citations to *Woods* v. *Covington Cty. Bank*, 537 F.2d 804, *General Motors Corp.* v. *City of New York*, 501 F.2d 639, 641 (2d Cir. 1974), and *United States* v. *Trafficante*, 328 F.2d 117, 120 (5th Cir. 1964), for the proposition that attorneys have been disqualified for the appearance of impropriety, even when there was no evidence of actual wrongdoing, is puzzling. 672 F.2d at 828. *Woods* contained no such holding and, in fact, created a test expressly designed to protect against such baseless disqualifications which, the Court noted, were prompted more by opposing counsel's strategy than by concern for ethical or propriety considerations. Additionally, all three cases involve disqualification motions premised on an attorney's prior involvement with a case during government employment, an issue not present here. Finally, and most significantly, all three cases are civil cases which do not implicate the Sixth Amendment.

Russell Hobson was deprived of his counsel of choice upon a panel majority's application of the *Woods* two-pronged test. Neither part of the test was the subject of an evidentiary hearing and both parts were resolved incorrectly. The major premise of the panel decision was expressed at the conclusion of the majority opinion:

> Although the allegations in the affidavits may be untrue in fact, *once the testimony is heard by the jury* the damage will have been done—such testimony very likely could result in erosion of public confidence in the integrity of the bar and of the legal system, and this erosion is precisely what Canon 9 is designed to prevent.

672 F.2d at 829 (emphasis added). The key to this holding was the assumption that the evidence would be *heard by the jury*. Before counsel is disqualified in a criminal case, trial judges must have more than an assumption that damaging testimony will be heard by a jury. Clyde Taylor should not have been disqualified.

A panel of this Court has placed an awesome weapon in the hands of every prosecutor in the Eleventh Circuit who feels that a defendant's conviction will be more probable if his defense counsel is disqualified. The power to remove an adversary's lawyer is the power to control litigation.

The panel's opinion invites endless and unseemly disputes in which prosecutors protest their good faith in making recusal motions and defendants charge them will deliberate emasculation of the Sixth Amendment.

This Court *en banc* should reconsider the impact of its panel's opinion and protect the prosecutors in this Circuit from the temptation to which they are now exposed. A new trial should be ordered.

CONCLUSION

For all of the foregoing reasons, Hobson respectfully suggests that the issue of the pre-trial disqualification of his chosen trial counsel be heard by this Court *en banc* and that a new trial be ordered.

Respectfully submitted,
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Dated: August 25, 1983

AFFIDAVIT OF PATRICK ROBINSON

During late December, 1978 or early January, 1979, I met Clyde Taylor at his office to discuss a pending case in which Taylor was representing me on Florida State charges of possession of more than 100 pounds of marijuana. This case later came to be known as the Tallahassee warehouse case. I also discussed with Taylor about Taylor getting in touch with Tom Alexander for the purpose of getting me work unloading marijuana. Taylor indicated that he would contact Alexander. During the conversation, Alexander came to Taylor's office and joined us. Alexander and I discussed a load of marijuana that had recently been seized and discussed my going to work for him in the near future on another load of marijuana that was coming into the North Florida area. (I subsequently learned from Taylor or John Daniel, attorney, that the load had been seized in Panama City, Florida.) During my conversation with Alexander, Taylor was in and out of the office and had full knowledge of what we were discussing.

/s/ PATRICK L. ROBINSON

Notarization

EXHIBIT A

AFFIDAVIT OF THOMAS E. ALEXANDER
(Original hand-written)

By request of; The United States Attorneys Office, Pensacola, Florida.

The following events that took place in and around Tallahassee, Florida during late January and early February 1979; are true to the best of my knowledge.

During the period of late Jan. '79 and early Feb. '79 I was in the Panama City Florida area waiting for a small plane load of marijuana that was to land at the Tri-County Airstrip. I was told that the plane had developed problems in South America thus the stateside landing never developed.

Traveling by automobile from Panama City to Ft. Lauderdale, I made a telephone call to Clyde Taylor, an attorney in Tallahassee, Fla. The telephone conversation with Mr. Taylor was not to report the failure of the Tri-County load, but to establish Mr. Taylors availability so that I could make an appointment. Mr. Taylor stated he was available and that [I] could come to his office.

When I arrived at Mr. Taylors office [he] was talking to a mutual acquaintance by the name of Pat Robinson. In Mr. Taylors pressence (sic) I discribed (sic) the reasons and related some of the details of the Tri-County failure [to] Mr. Robinson.

(See page two)

EXHIBIT B

AFFIDAVIT OF THOMAS E. ALEXANDER
Page 2

While Mr. Robinson and I were engaged in another conversation, Mr. Taylor was in and out of his office. It was during this time that I was relating the possibility of him (Mr. Robinson) off-loading [a] Constellation airplane load of pot should [he] be needed in the near future. Toward the end of my conversation with Mr. Robinson, Mr. Taylor returned to his office; was present, and I feel reasonably sure that he (Mr. Taylor) had full knowledge of the context of my conversation to solicit Mr. Robinson (sic) services.

Mr. Taylors pressence (sic) during my conversation was by no means threatning (sic) to what I was discussing with Mr. Robinson, therefore I didn't feel compelled to curtail it in Mr. Taylors company.

The plane that Mr. Robinson and I were talking about was a constellation aircraft that was apprehended at the Panama City Airport on or about February 14, 1978.

/s/ THOMAS E. ALEXANDER

Notarization

CERTIFICATE OF SERVICE

I, James M. Shellow, an attorney, certify that I caused a copy of the foregoing document, Hobson's Suggestion for En Banc Consideration of the Issue of Disqualification of Counsel, to be served upon all counsel of record in this matter on August 25, 1983.

_____

JAMES M. SHELLOW